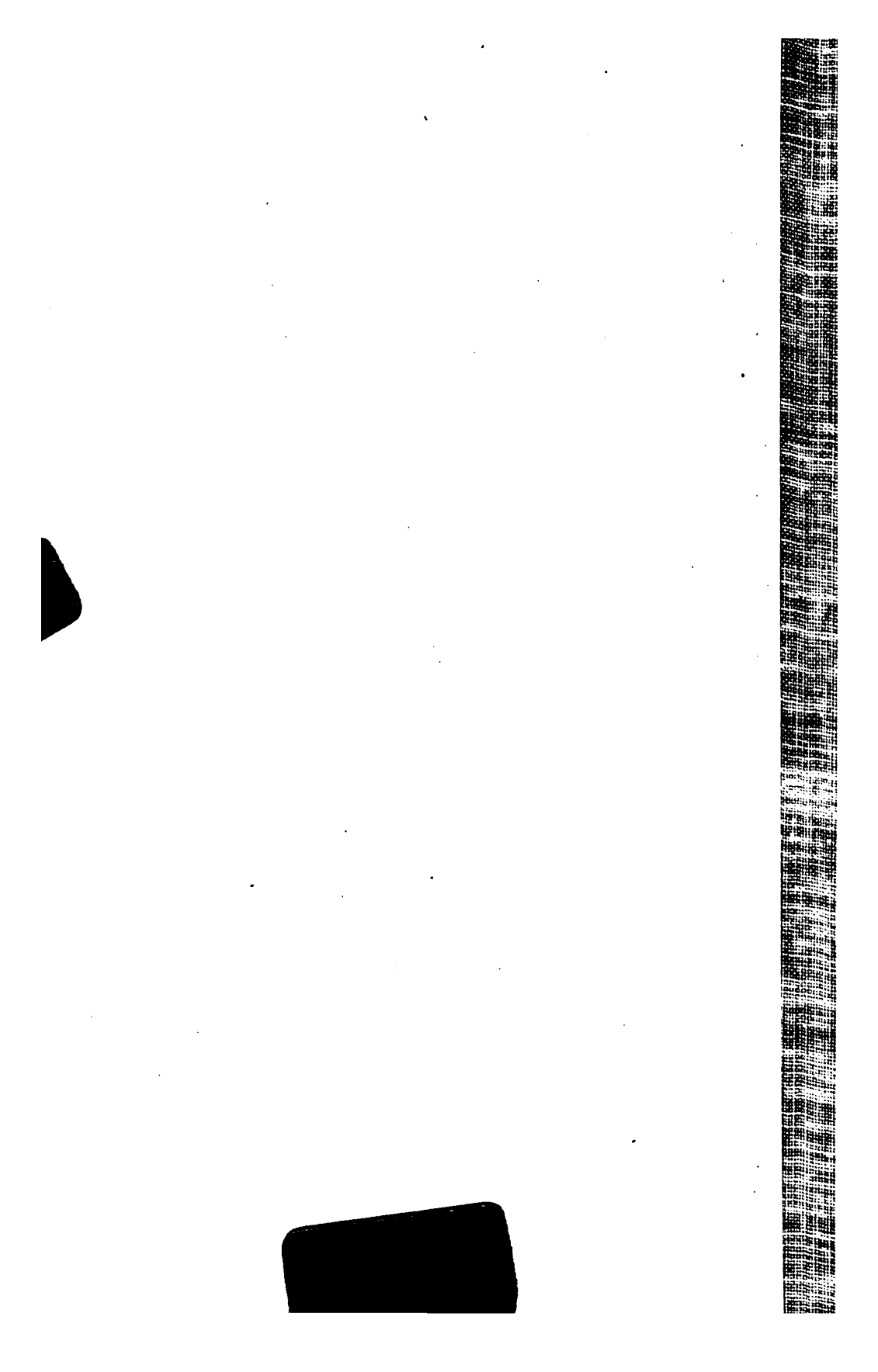

REPORTS OF CASES

ARGUED AND DETERMINED IN THE VARIOUS

COURTS OF APPEAL

OF THE

STATE OF LOUISIANA.

VOLUME II.

REPORTED BY

HON. FRANK McGLOIN,

One of the Judges of the Court of Appeals for the Parish of Orleans.

NEW ORLEANS:
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1884.

JUDGES OF THE COURTS OF APPEAL

OF THE

STATE OF LOUISIANA,

Elected by the General Assembly of the State on the 22d day of January, 1880, under Article 96 of the Constitution, and appointed since that date to fill vacancies.

NAMES.	TERM OF OFFICE.	COMPOSITION OF THE CIRCUITS.
JOHN CONWAY MONCURE..	8 years.	Caddo, Bossier, Webster, Bienville, Claiborne, Union, Lincoln, Jackson, Caldwell, Winn, Natchitoches, Sabine, DeSoto and Red River.
ALEXANDER BANKS GEORGE	4 years.	
THOMAS P. CLINTON*.....	8 years.	Ouachita, Richland, Franklin, Catahoula, Concordia, Tensas, Madison, East Carroll, West Carroll and Morehouse.
ANDREW A. GUNBY†.....	4 years.	
JOSEPH MURTOUGH MOORE.	8 years.	St. Landry, Avoyelles, Rapides, Grant, Vernon, Calcasieu, Cameron, Vermillion, Lafayette, Iberia and St. Martin.
ALFRED BRIGGS IRION.....	4 years.	
CHARLES MCVEA.....	8 years.	East Baton Rouge, West Baton Rouge, Livingston, Tangipahoa, St. Tammany, Washington, St. Helena, East Feliciana, West Feliciana, Pointe Coupée and Iberville.
SAMUEL JAMES POWELL...	4 years.	
EUGENE WILLIAM BLAKE‡.	8 years.	St. Mary, Terrebonne, Assumption, Lafourche, St. Charles, Jefferson, St. Bernard, Plaquemines, St. John the Baptist, St. James and Ascension.
HENRY D. SMITH§.....	4 years.	
WALTER HENRY ROGERS..	8 years.	Orleans.
FRANK MCGLOIN.....	4 years.	

*Appointed by the Governor July 5th, 1883, vice Hon. Owen Mayo, deceased.

†Appointed September 9th, 1881, vice Hon. William Wood Farmer, resigned.

‡Appointed June 25th, 1880, to fill the vacancy occasioned by the death of Hon. Joseph Richard Winchester, deceased.

§Appointed March 31st, 1882, vice Hon. Adrien Charles Dumartrait, deceased.

CASES
ARGUED AND DETERMINED
IN THE
COURTS OF APPEAL
OF THE
STATE OF LOUISIANA.

F. DESPART *v.* M. A. DARAMBOURG *et als.*

1. The right to sue for the nullity of an act of donation, as containing a conveyance *omnium bonorum*, under the prohibitory clause of Article 1484 of the Civil Code, is a personal one, restricted to the donor or his forced heirs.
2. As regards creditors, such a donation can be attacked only in the revocatory form, on alleging and showing that the same was passed in fraud of their rights, and that they are injured thereby.
3. As an action of revocation, however, such a cause of action prescribes in one year.

Appeal from the Twenty-sixth Judicial District Court of the Parish of St. Charles. Hahn, J.

James D. Augustin for plaintiff and appellee.

L. DePoorter for defendants and appellants.

BLAKE, J.—Plaintiff sues to set aside, as an absolute nullity, an act *inter vivos* from his debtor to her illegitimate child, one of the defendants in this case, on the grounds that it is a conveyance *omnium bonorum* expressly prohibited by Article 1484 of the Civil Code, and because a donation between such parties is forbidden by the laws of this State. He seeks to have the property donated declared subject to the satisfaction of a judgment which he holds against the donor.

Defendants, by way of exception, urge that plaintiff is without

cause of action on that branch of his case, claiming a nullity for the reason that said act of donation is in violation of a prohibitory law, which is non-actionable as to him; and as a revocatory action, the same is barred by the prescription of one year.

The judgment of the lower court is in favor of plaintiff decreeing the absolute nullity of the act of donation.

We must first consider the merits of the exceptions urged.

Article 1484 of the Civil Code reads as follows: "The donation *inter vivos* shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do it, the donation will be null for the whole."

The prohibitory clause in the above Article, in common with all others looking to the nullity of acts of gratuitous donations specified in the Code, seems to have been dictated by motives of sound public policy. The legislator, through this safeguard, intended that no person in the exercise of an unbounded and unwise generosity should divest himself of his worldly goods to the extent of beggaring himself and becoming a burden on society. The moment that the beneficiary becomes ungrateful, unmindful and unsolicitous towards his benefactor, the law affords the latter and his heirs relief by invoking the nullity of his gratuity; but this right seems to be personal to the donor and his heirs, and is not intended to be exercised by third parties—strangers to the act.

We hold, therefore, that in so far as the plaintiff is concerned, this branch of his case is unactionable, and that the defendants' exception in this respect is well grounded in law.

Although we deny the right of the plaintiff to attack the donation in question on the grounds of its absolute nullity under Article 1484 of the Code, we recognize his right to attack the same as having been passed in fraud of his rights as a creditor. This is a right common to all creditors, whatever may be the character of the act sought to be annulled, and the courts upon a proper showing, will *quoad* their debts, set the same aside, provided in the revocatory action instituted for this purpose the essential allegations of fraud and injury are set forth.

It appears from the evidence in this case that the donee went into possession under the act of donation, and remained in possession more than one year after the plaintiff had obtained his judgment against the donor.

The plea of prescription set up by defendants against the revocatory action must prevail.

Judgment reversed.

No. 126.

JOHN H. SCOTT AND J. P. JACOBS *v.* WM. E. SEWELL AND JOS. L. MONTIEU.

1. In a suit for damages for wrongful issuance of an injunction, the judgment dissolving the same is sufficient proof of the illegality of the writ.
2. It is difficult to establish with precision the amount of loss suffered by reason of the wrongful issuance of an injunction, and the courts, in assessing damages, will often approximate.
3. While the law favors an appeal to the courts for the enforcement of legal rights, yet those who invoke its severe writs, injunction, etc., do so at their peril.
4. In a suit for damages for issuance of an illegal injunction, while the court will not question the original judgment dissolving the same, it may investigate the issues of such former cause, with a view to ascertaining whether the plaintiff in the writ complained of had reasonable grounds for supposing himself entitled to the writ.
5. A mere mark or symbol which can be used by one with as much propriety as another, cannot become a trade-mark.
6. The mark must denote the origin or ownership of the goods, and not the kind or quality. Letters or figures applied to merchandise by a manufacturer for the purpose of denoting its quality only, cannot be appropriated by him to his exclusive use as a trade-mark.
7. The Recordation in the Patent Office of a pretended trade-mark confers no additional value to the same.
8. In an action upon an injunction bond, the plaintiff may recover a reasonable amount as attorney's fees paid or incurred in procuring a dissolution of the injunction.

Appeal from the Fifth District Court, Parish of Orleans. Rogers, J.

W. E. Murphy and *Chas. E. Rice* for plaintiffs.

Breaux & Hall for defendants, appellants.

The opinion of the Court was delivered by A. GRIMA, Esq., member of the bar, Judge *ad hoc*, vice ROGERS, Judge, recused, having decided the cause below.

GRIMA, Judge *ad hoc*.—This is a suit in which each of the plaintiffs prays for judgment for the sum of five hundred dollars against the defendants as principal and surety on an injunction bond.

The plaintiffs complain that the defendant Sewell brought, in the Fifth District Court for the Parish of Orleans, a suit against them, the said plaintiffs, alleging, among other things, that the said Scott and Jacobs were indebted unto him the said Sewell in the sum of five thousand dollars—damages caused him by the alleged infringement of a pretended trade-mark, to-wit: the word "Septoline," a word which in his petition in the said suit he alleged was used by him to indicate "the quality of oil" sold by him under that name, and also charging in his said petition the existence of a conspiracy between the petitioners to destroy, by the use of said pretended trade-mark, the business of said Sewell.

The plaintiffs further show that, on filing the said suit, said Sewell obtained a writ of injunction enjoining them from using the said pretended trade-mark in any manner in the sale of illuminating oils, either by writing, printing, marking, or any other character or device, or from using the word "Septoline" verbally in selling oil under that name, or in any manner, either verbally or otherwise, using said word "Septoline" in any manner so as to indicate that oil sold was understood to be what was or is known as "Septoline" oil. Plaintiffs finally show that the said Sewell's suit was dismissed, and that they suffered damages by the said suit and injunction, in counsel fees, which they had to pay in the defence of the same, and by interruption of their business and loss of customers and trade, and look to the said Sewell and the injunction bond furnished by him to obtain indemnity therefor.

The answer is a general denial.

Judgment was rendered against the defendants *in solido* in

favor of the plaintiff Scott for $250, and of the plaintiff Jacobs for $150, with legal interest from judicial demand.

The defendants appealed to this Court, and the plaintiffs, in their answer to the appeal, pray, the plaintiff Scott for an increase of the damages to the sum of $400, and the plaintiff Jacobs for its increase to the sum of $500.

The judgment dissolving the injunction sued out by Sewell is a sufficient proof that the injunction was wrongfully issued, and determined the liability of the defendants on the bond. C. P. 304; 13 La. An. 22, 214. The injunction which has been set aside, being not one to stay the execution of a moneyed judgment, the remedy by suit on the bond, which has been resorted to in this case, is the proper one. 28 La. An. 859, Will vs. Elam; 29 La. An. 630, Sheen vs. Stothart.

The next inquiry is as to the measure of damages. The law of Louisiana provides that every act whatever of man that causes damage to another obliges the person by whose fault it happened to repair it. R. C. C. 2315.

The evidence is not very precise as to the losses in money inflicted on the plaintiffs by the injunction obtained against them; indeed, it is hardly possible in such cases to arrive at more than an approximate figure. The record discloses the fact that the defendant Sewell committed acts which were calculated to injure the plaintiffs' trade; he caused publications to be made in two or three journals having large circulation in New Orleans, in the form of "notices to Grocers and others," over his signature, informing of the injunction which he had obtained, and warning against dealing in oil without his leave; he caused bills to be printed and posted to the address of "dealers and consumers of illuminating oil," giving to understand that Scott had been imposing upon grocers and dealers an inferior article of oil under the name of Septoline oil, and notifying them of the said injunction; he sued Jacobs several times before Justices' Courts, and he brought three different suits before the late Fifth and Sixth District Courts for the Parish of Orleans, one against Scott and

Jacobs, and two against Scott alone, all being injunction suits, and all of which suits and injunctions were dismissed. The organic law of the State provides that all courts shall be open to minister justice by adequate remedy and due process of law, Constitution of La., Art. 11; and the law looks with favor on those who invoke the aid of the tribunals established by itself for the vindication of rights; but in affording the remedy of attachment, injunction, and other like remedies in extraordinary cases, the law gives the warning to those who wield such weapons that they so do at their peril. 32 An. 1181, Barrimore vs. McFeely.

We have looked in vain throughout the record of this case for any circumstances in justification of the persistent effort of the defendant Sewell to restrain the plaintiffs' dealings in illuminating oil. His counsel laid stress on the circumstance, as argued by him, that Sewell had a reasonable ground to believe he had a good cause of action, and was not prompted by malice. Without presuming to enter into and comment upon the law and facts upon which the judgment of the District Court dismissing the said injunction suit was founded, in justice only to the appeal made by the defendants' counsel, we have looked into the law on the subject of trade-marks, and we find the following to be settled, to-wit: "A mere mark or symbol which can be used by one with as much propriety as another, cannot become a trade-mark." Upton on Trade-marks, p. 26. "The mark must denote the origin or ownership of the goods, and not the kind or *quality*." Ib. 98, 99.

"Letters or figures affixed to merchandise by a manufacturer, for the purpose of denoting *its quality* only, cannot be appropriated by him to his exclusive use as a trade-mark." 101 U. S. Reps., Manufacturing Company vs. Trainer; 54 Ill. 439, Candee, Swan & Co. vs. Deere & Co.

The petition of Sewell admits in so many words that the word "Septoline," which he claims as a trade-mark, indicates a *quality* of oil; the recordation of such a claim in the patent-office does not confer any more character or value to the same. That he may have thought that he had the law on his side, is a plea of

ignorance of the law, and it does not appear that such prudence or moderation were used by him as would present circumstances in support of the argument in mitigation of damages.

The proper measure of damages is the full indemnity to the plaintiffs for the losses sustained. Field on the Law of Damages, p. 544, § 687.

In an action upon an injunction bond for damages caused by wrongfully suing out the writ, the plaintiff may not only have his ordinary and actual damages, that result from the injunction, but in addition thereto a reasonable amount as attorney's fees paid or incurred in procuring a dissolution of the injunction. Field, p. 442, § 555; Sedgwick on Measure of Damages, pp. 97, 35; 12 La. An. 181, McRae vs. Brown, Sheriff; 13 La. An. 214, Accessory T. Co. vs. McCerren; 14 La. An. 333, Hereford vs. Babin, 23 La. An. 436, Pendleton vs. Eaton & Barstow and Sheriff.

We believe that justice will be done by allowing to each of the plaintiffs, as damages, the sum of one hundred and fifty dollars, in addition to the attorney's fees incurred by them in the defence of the said injunction suits.

The judgment of the District Court is therefore amended, and proceeding to render such judgment as should have been rendered herein, it is ordered, adjudged and decreed that there be judgment against the defendants Sewell and Montieu *in solido*, in favor of the plaintiff J. H. Scott for the sum of three hundred and fifty dollars, and in favor of the plaintiff J. P. Jacobs for the sum of three hundred dollars, with costs in both courts.

No. 150.

JOHN PHELPS & CO. *v.* FARMERS' & MERCHANTS' BANK, OF PARIS, TEXAS.

1. Bills of lading are representatives of the property described by them, or "symbolical" thereof, whereas a promissory note is an unqualified promise to pay a certain sum at a certain time.
2. A bill of lading, therefore, like the property it represents, may be transferred independent of the question of negotiability.

3. Bills of lading are *quasi-negotiable*, and hence transferrable without endorsement.
4. The law merchant is a part of the law of Louisiana; and it is such, as interpreted by the courts of other States, except where modified by our own statutes.
5. The Act of 1868, No. 150, p. 193, had for its object to sanction by statute transfers of bills of lading, to prevent frauds in connection therewith and to facilitate commercial transactions relating to bills of that character.
6. Neither the provisions of that statute, however, nor those of La. Revised Statutes, Section 2482, transform bills of lading, or other similar documents, into promissory notes or commercial bills of any kind.
7. A bill of lading is not placed by the Louisiana law upon the same footing as ordinary commercial paper; and the endorsement of such a bill does not bring into operation the general laws and usages which prevail as between endbrsers and endorsees of promissory notes or bills of exchange.
8. Where a bill of lading, unendorsed, is attached to a draft as a security for the latter, and the draft is endorsed to another "for collection," such endorsement of the draft, accompanied by delivery of the bill of lading, empowers the endorsee of the draft to enforce the delivery of the property constituting the shipment.
9. The commercial laws or usages making commercial paper negotiable, and those which exclude equities between parties thereto, are not identical; and the mere extension of the laws and usages making commercial paper negotiable, by endorsement, to bills of lading or similar documents, does not extend to those last named, the rules and laws of commercial estoppel as between parties.
10. Where, as in this case, it is attempted to hold the one who collected the draft attached to a forged bill of lading, the latter being a security, as one who has received money from another who has paid in error, it is contradictory to contend also that the recipient is liable upon the bill of lading as an endorser or guarantor of the said bill of lading.
11. If the contract evidenced by the draft be null for fraud, error or deceit, the cause of action on the part of the injured one is solely against the fraudulent drawer, for the *bona fide* holder of such commercial paper is not to be affected by the frauds which led to the contract between the original parties.
12. In a case where one party draws upon another, annexing as a security a fraudulent or forged bill of lading, and negotiates the draft to an innocent third person, the purchaser of the draft is not held to know that the acceptance was solely upon the credit of the bill of lading.
13. The unqualified acceptance or payment by the drawee, in such a case, constitutes, against the drawee, a declaration of right in the drawer to put out the draft, and leaves him no right to object to the holder that he was negligent in the matter of accepting the bill of lading.
14. Where the bill of lading in such a case stipulates for the delivery of property to the order of the one who has negotiated and paid for the draft to which it is attached, and the holder of the draft and bill of lading places upon the latter the following inscription, "Pay to the State National Bank, N. O., or order, *for collection*"—held, this did not transfer title to the State National Bank, or authorize

it to endorse said bill of lading to anyone else in the name of or for the original negotiator of the draft.

15. The authority conferred by such an inscription was simply to enforce the bill of lading at the port of delivery for the benefit of the owner, in case the draft annexed was not paid.

16. Nor in such a case as this could the mere stamping on the back of the bill of lading, upon payment of the draft attached, of the words, "State National Bank, New Orleans, Paid," be considered in any event as an endorsement.

Appeal from the Civil District Court, Parish of Orleans. Monroe, J.

Thos. J. Semmes & Payne for plaintiffs.

Jas. McConnell for defendants and appellants.

ROGERS, J.—McCuistion, Jr., drew a draft dated April 21, 1880, at Paris, Texas, on John Phelps & Co., in favor of the Farmers' and Merchants' Bank, payable at sight, for $750—and said draft was indorsed by said Bank. Attached to the draft was a bill of lading for nineteen bales of cotton, purporting to have been issued by the Texas and Pacific Railroad Company. The cotton was consigned in the bill of lading to the order of the Farmers' and Merchants' Bank, and the bill of lading was indorsed by said Bank, and forwarded, together with the draft, to their agent here, the State National Bank, who presented both the bill of exchange and the bill of lading at the office of John Phelps & Co., who paid the bill of exchange on the faith of the bill of lading so indorsed. Subsequently, it was discovered that no such bill of lading had been issued by the railroad company, and that the instrument purporting to be a good bill of lading was a forgery. John Phelps & Co. at once demanded that the amount paid by them, as they allege, on the faith of the bill of lading indorsed by said Bank, be refunded, which the State National Bank, as agent of the Farmers and Merchants' Bank, refused to do.

McCuiston was a correspondent of plaintiffs, and had had several transactions with them relative to the shipment of cotton and drawing of drafts. This appears from the following statement, which we find in the record:

Statement of Drafts drawn by M. H. McCuiston, Jr., on and paid by John Phelps & Co.

1880.

Mch. 11.	To draft to Farmers' and Merchants' Bank against 41 bales cotton, with bill lading attached		$2410 00
do 13.	do 21 bales cotton, with bill lading attached		1212 03
do 19.	do 38 do do do do		2100 00
Apr. 22.	do 15 do do do do		700 00
do 24.	do 19 do do do do		750 00
do 27.	do order,		200 00
E. & O. E. 134 bales cotton			$7372 48

NEW ORLEANS, Nov. 9, 1880.

The draft which is entered in the foregoing account on April 24, against 19 bales of cotton, for $750, is the one to which McCuiston attached the forged bill of lading. The draft was genuine, but the bill of lading was a forgery.

The Farmers' and Merchants' Bank in Paris, Texas, it is admitted, discounted the draft with the bill of lading annexed, in good faith, in the usual course of banking business, in the honest belief that it was genuine, and paid the full amount for the same, less the customary discount.

The letter written by McCuiston to the plaintiffs, advising them of this draft and shipment of 19 bales of cotton, reads as follows:

"BLOSSOM PRAIRIE, Texas, April, 1880.

"Messrs. JOHN PHELPS & Co., New Orleans:

"*Gentlemen*—I have to-day received acc't sales 61 bales sunk cotton, netting $3584.36. Have to-day sent you 19 B. C. of pretty cotton, all good, and drew a draft against it favor F. & M. Bank for $750. I also drew one favor Star Gales for $200. Will send more cotton Friday, enough at least to keep my margins ahead. Write me your views on the market. Have great confidence in your (Phelps') judgment or cotton sense.

"With kind regards,

"M. H. MCCUISTON, JR.,

"Successor to McCuiston & Lambert."

That this letter was received there is no dispute; the record shows it was answered on April 29th.

The draft was in the usual form. The bill of lading attached to the draft was in these words:

"PARIS STATION, April 20, 1880.

Received from M. H. McCuiston, Jr., to be shipped to Shreveport, La.—19 B. C. R. WARMS,

Marked Agent Texas and Pacific Railway Co.

H. M.

Consigned to—order

Farmers' & Merchants' Bk.

Notify John Phelps & Co.

New Orleans, La.

19 B. C.

The indorsement was: "Pay State Nat'l Bank of N. O. or order, for collection on account of Farmers' & Merchants' Bank, Paris, Texas. C. W. HERTZ, Cashier."

On the 24th of April, 1880, the State National Bank of New Orleans presented the draft, with bill lading attached, to John Phelps & Co., who paid it without objection.

The present suit was brought on the 4th of June, 1880, and then it is admitted McCuiston had absconded and now is utterly worthless.

Plaintiffs, in whose favor judgment was rendered in the lower court, say:

"On the trial, in the lower court, of the suit brought to recover the money thus paid by John Phelps & Co., the vital question was, what is the effect of an indorsement of a bill of lading, made negotiable by the laws of this State, as regards the liability of the indorser? Section 2485, Revised Statutes, declares 'that all bills of lading * * shall be negotiable by indorsement in blank, or by special indorsement *in the same manner and to the same extent* as bills of exchange and promissory notes.' It is, therefore, contended that an indorsement of a bill of lading carries with it the liability attendant upon the indorsement of other negotiable instruments."

The defendants contend that the plaintiffs cannot compel them to refund the amount of the draft so paid, in view of the following legal considerations:

I. Commercial questions of this character, to-wit: whether a bill of lading is a negotiable instrument and the extent of the liability of an endorser thereof, is determined by the *lex mercatoria*, or law merchant, under which it is perfectly clear the defendants would not be liable as endorsers of this bill of lading. Shaw vs. Railroad Co., 11 Otto, 562 *et seq.;* Hoffman vs. Bank of Milwaukee, 12 Wall. 181 *et seq.;* 91 U. S. p. 94; 42 Eng. Common Law, 63 *et seq.;* 15 Penn. Stat. 238.

II. The principles of the *lex mercatoria or law merchant* prevail in Louisiana and Texas and every other State of the Union, unless modified specially by statute.

In 1 La. An. 325-326, Mr. Justice Slidell, in deciding the case of Bradford vs. Cooper, said: "It is a fact of which we deem it our duty to take judicial notice, that the *law merchant* prevails throughout the States of this Union, except so far as the same may be modified in particular States by statute." See also 4 La. An. 206, 210.

III. The only chance, therefore, for plaintiffs to recover in this suit is for them to show affirmatively a statute by which the principles of the law merchant have been so modified; and in considering such statute, all courts are governed by the following rule laid down by the Supreme Court of the United States:

"No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange, not to be inferred from words that can be fully satisfied without it." 11 Otto, p. 565; 12 Wallace, p. 190.

IV. Section 2485 of the Revised Statutes of Louisiana is similar to like statutes passed on the same subject by the States of Missouri and Pennsylvania, which have been construed by the Supreme Court of the United States, and the interpretation so

given is applicable here, and must preclude the plaintiffs' recovery." See Shaw vs. Railroad Company, 11 Otto, 562-565; see also, 12 Wall. p. 190.

Two other points are made which we do not consider necessary to the determination of the case.

Plaintiffs reply:

"If the authorities cited by defendants were the common law, the law of Louisiana would determine the question of liability at once. These authorities, however, though good law, are inapplicable to the case at issue, because in England and in many States in the United States, the law merchant has not been changed by statute. Daniels on Negotiable Instruments, Vol. II, pp. 621, 623, says that, though bills of lading are generally classed among negotiable instruments, and are frequently spoken of as negotiable, that it is more correct to call them 'quasi negotiable, since they are *like* rather than OF them;' and on p. 623 he says: 'It will be seen that their peculiar properties (refering to transfer by indorsement) are attributable rather to a liberal application of the doctrine of equitable estoppel for the benefit of trade, than to any custom or statute which placed them upon the footing of negotiable instruments, for both of these sources of negotiability are wanting.' Such being the common law doctrine, necessarily an indorsement of a bill of lading in England, where there has been no statutory modification, does not carry with it the liability assumed by an indorser of a negotiable instrument. Therefore, the cases of Leather vs. Simpson, L. R. 11 Eq. 401, and Robinson vs. Reynolds, 42 E. C. L. 634, though parallel cases as far as the facts are concerned, do not apply to the case at issue, because by statute we have clothed bills of lading with all the attributes of negotiable instruments, something unknown to the common law. The Pennsylvania cases cited are equally inapplicable for the same reason, that we must presume the common law to be the law governing those cases, without evidence to the contrary. The case of Shaw vs. Railroad, 101 U. S. 557, is cited, as the expression of the highest tribunal on the question of the liability

arising out of the indorsement of a forged bill of lading. In this case, the statutes of Pennsylvania and Missouri were both regarded by the Court in order to determine the question. The statute of Pennsylvania simply says: 'Bills of lading shall be negotiable and may be transferred by indorsement and delivery;' while Missouri has enacted that 'they shall be negotiable by written indorsement thereon and delivery in *the same manner* as bills of exchange and promissory notes,' and the Court most properly says: 'No statute is to be construed as making any innovation upon the common law which it does not fairly express, nor altering the common law further than its words import.' * * * 'It cannot be, therefore, that the statute which made them (bills of lading) negotiable *in the same manner* as bills of exchange, intended making them so in all respects.' But our statute expressly says not only *in the same manner*, but also *to the same extent*, that is to say '*in all respects.*' No interpretation can be placed upon the words 'same extent,' if they do not mean, that to the same extent that bills of exchange and promissory notes are negotiable, with all the resulting effects, so also hereafter, shall be bills of lading. The rule laid down in Platt vs. R. R. Co., 99 U. S. pp. 58 and 59 is, that in putting a construction upon a statute it must be expounded so as to give effect to every part of it, and when a given construction would make a word redundant, it was reason for rejecting such construction; hence, some further interpretation must be put upon the expression '*and to the same extent,*' made use of in Section 2485, Revised Statutes, relative to the negotiability of bills of lading."

We have availed ourselves of the labors of the learned counsel who have prosecuted and defended this cause, and have quoted at length from their statements of fact (which we find in all particulars sustained by the record), and their arguments. The questions submitted are of interest from their relation to commercial conduct and as involving a construction of a statute of the State, upon which no determination has been had by our highest Court.

Bills of lading and promissory notes have well and accepted

definitions, their relations with affairs are regulated and ordained by law, and their uses and force imbedded into the commercial condition of this country and all commercial countries.

The former are representative of the property described by them. "Symbolical of the property it describes," is a quotation most apt in its expression. A promissory note is an unqualified, unconditional promise to pay a certain sum at a certain time.

A bill of lading, therefore, like the property it represents, may be transferred independent of the question of negotiability. The law merchant has, however, out of the necessities of trade and enlightened dealings between men and nations, adopted a usage in regard to such transfers, that has overcome law. Since Twyne's Case, 1 Smith L. C. 1, it was held that any transfer of property without actual delivery was a fraud; even where good faith existed; from the inconveniences and difficulties attending mercantile enterprises when delivery had to be actually made at the moment of transfer, transactions were virtually destroyed; custom gave to certain evidences of contract, *e. g.*, bills of lading, that effect which is defined so accurately in the quotations from Daniels, and by counsel for plaintiff, "quasi negotiable, since they are rather *like* than *of* them." Daniels on Negotiable Instruments, Vol. II, p. 621.

Hence, bills of lading are transferrable without endorsement. 4 Comst. 497; 9 Barr, 475, and authorities cited; 7 Reporter, 275, and also 31 La. An. 846, Chopin vs. Clark, as an examination of the facts will show.

Take the opinion of the Court in Holmes vs. German Society Bank, 7 Reporter, 275: "The bill of lading was attached to the draft as a security for its payment. It was, therefore, evidence of an appropriation of the proceeds of sale of the property contained in the bill of lading, whether the bill was endorsed or not."

The law merchant is a part of the law of Louisiana, (Thompson vs. Mylne, 4 La. An. 200) and as interpreted by the Courts in other States, will be adopted in this, except when modified by statute. The Act of 1868, No. 150, p. 193, was enacted after the

establishment of this principle, and we must construe it, therefore, by the light of what had been decided by the Courts.

An examination of the entire statute must convince, that the objects of the various sections were in aid of the already universally recognized rules and to throw around these peculiar engagements of commerce the sanction of the law, to punish illegal practices, and to determine the means of facilitating enterprises through a species of transaction, entering so largely into commercial pursuits as bills of lading, cotton press, warehouse and shipping receipts, and all these forms of dealing are made negotiable, (just as bills of lading), Sec. 2485, Revised Statutes, by indorsement in the "same manner and to the same extent as promissory notes." None of these, however, are promissory notes, nor have they relation to money, except as representing a claim in or to money as property, or to property which, of course, has a moneyed value. In the enactment of the statute, the State performed a duty which required that safeguards should be thrown around these matters and to impose such conditions as the public interest required. It, the statute, does not profess to give a more extended importance to such documents than already obtained in the mercantile world; nor does it make either of them a bill of exchange or a promissory note. Every bill of exchange, every promissory note, is not negotiable, and there are conditions imposed upon the instruments under consideration, by the statute, which would at once destroy those rights which result from title, in a negotiable promissory note. Bills of lading, under the statutes of this State, are, with or without endorsement, nothing but the symbol of property, and their delivery is made the evidence of appropriation or as decided in 29 Maine, 419, "by indorsement they pass title to the indorsee;" there is no warranty expressed, nor can any be implied. It is not a sale.

In Bank of Syracuse vs. Armstrong, 7 Reporter, 657, the Supreme Court of Minnesota held, that "a promise, in the form of a promissory note, in a contract of sale of a reaper, the sale to be absolute in the payment of the note, was not an obligation entitled to the privileges of a negotiable instrument."

As decided, such an instrument had none of the requisites of a note. "It was not an independent, absolute, unconditional promise for the payment of a precise and definite sum of money in all events, and without any contingency, as is essential to the validity of commercial paper."

The same may be said of a bill of lading, and it will not be contended, because the legislature proposes to apply to it a commercial usage, and permitting to arise therefrom a character of negotiability, one of the consequences, not one of the attributes of a promissory note, that it thereby becomes a promissory note.

Would it (bill of lading) not, like the promise referred to in the case just cited, be an obligation of a "character altogether too uncertain to serve the purpose of commercial paper as the representative of money in business transactions?" It comes into the hands of every holder, with notice of the existence of a condition that may result in defeating any recovery upon it and, therefore, cannot have accorded to it the privileges attaching to that kind (negotiable) of paper."

These conditions are evident from the nature of the contract, which is but an acknowledgment by the carrier of the reception of the goods and an obligation to deliver them in safety at the port of discharge; and these conditions are expressed in the body of the instrument.

There is virtually no difference between the statute of Missouri and that of Louisiana by the insertion of the additional words, to the "same extent," in our statute. Nor can we agree that these words should be construed to mean "in all respects." To say, that by an indorsement of a bill of lading it is thereby negotiable "in all respects" as a promissory note, this Court would make an instrument entirely inconsistent with the statute and at variance with every established principle of usage and law, as applied to negotiable paper.

The reason of the statutes of Pennsylvania, Missouri and Louisiana is evident.

The transfer of the bill of lading by indorsement to indorsee, while it appropriates the property or the proceeds, does not vest

absolute title, nor does it necessarily vest more than an equitable claim to a portion of the goods, or give a pledge or lien for the payment of the advance or draft attached to which, as security, is the bill of lading. Kinne's Law Com., page 226, Vol. II, and authorities there cited; Sec. 2482, Rev. La. Stat.

The principle established in Canard vs. Atlantic Insurance Co., 1 Peters, 445, was:

"Strictly speaking, no person but the consignee can, by any indorsement in the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be delivered to his order; yet by assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons except purchasers, for a valuable consideration, without notice, by indorsement on the bill itself."

It was eminently proper, therefore, to enact such laws as would give some substantial effect to the transfers of these necessary instruments of commerce and, as far as possible and consistent with their character, make them negotiable in "the same manner and to the same extent" as promissory notes are negotiable—*indorsement—delivery*—the right to sue on the contract—for example; avoiding thereby the questions of assignment and conflicting title suggested in the opinion in Canard vs. Atlantic Ins. Co., just quoted, and the actual delivery of the goods themselves; but to apply the statute of this State so that an indorsement of a bill of lading carries with it the liability attendant upon the indorsement of other negotiable instruments, would be contrary to a just and proper interpretation.

We have so far considered the general effect of the negotiability of bills of lading by indorsement. Turning to the case before us, we find that McCuiston purported to ship nineteen bales of cotton to John Phelps & Co. For these nineteen bales of cotton he received a bill of lading; this bill of lading he attached to a draft for $750, drawn on John Phelps & Co., who were to receive

this cotton for account of McCuiston, their correspondent; this bill of lading was not indorsed by McCuiston, but was delivered to defendants with the draft, as a security for the sum advanced, and such delivery and possession was sufficient to operate as an appropriation of the property or proceeds resulting from its sale. 25 Ohio Stat. 360; 14 N. Y. 497; 44 N. Y. 136.

The draft was genuine; the bill of lading proved to be a forgery. No question of bad faith or improper practices arise. Defendants *indorse for collection* to the State National Bank of this City, the draft and the bill of lading, and on presentation plaintiffs pay and receive from the State National Bank the draft and the security or bill stamped by the State Bank "*paid.*". This delivery to plaintiffs of the bill of lading, without any other form or question, at once gave them the right to demand, receive and, if necessary, in their own name, sue for these goods; a right arising at once from the payment of the draft and the possession of the bill of lading. If the statute intended to hold an endorser of a bill of lading or shipping receipt responsible, "in all respects," as it would an endorser on a promissory note or bill, it would certainly have provided in some positive manner for so great a change in the destination of mercantile instruments.

Sec. 2482, Rev. Stat., says: "* * any bill of lading, etc., * * may be transferred by indorsement thereon, and any person to whom the same may be transferred shall *be deemed and taken to be the owner of the goods, etc.* * * *So far as to give validity to any pledge, lien or transfer made or created, etc.* * * No property shall be delivered, except in surrender and cancellation of the original receipt, bill of lading, etc. * *"

Thus is described the negotiability of bills of lading, and as thus provided, they are negotiable, undoubtedly, "in the same manner and to the same extent as bills of exchange and promissory notes;" but their character, as symbols of property, remains,

The decision in Shaw vs. Railroad Co., 101 U. S., page 565, is exhaustive, and there is no reason why it should not prevail as authority in Louisiana.

It is the construction of statutes, similar to the one existing here, by the highest tribunal in the land.

Say the Court:

"They (bills of lading) are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to *change totally their character*, put them, in all respects, on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually follow the negotiation of bills and notes. *Some of these consequences would be very strange, if not impossible.* SUCH AS THE LIABILITY OF INDORSERS, ETC."

This view is conclusive of this case and its citation as authority sufficient, but justice to the counsel and the questions urged by them required the examination given.

Judgment reversed and judgment in favor of defendants with costs in both courts.

CONCURRING OPINION.

McGLOIN, J.—The facts of this case are fully stated by my learned colleague, and while I agree with him in the legal propositions he has announced, there are others which have had an influence upon my mind, and which I deem it proper to state briefly.

The Section 2484, Revised Statutes of Louisiana, makes bills of lading "negotiable by endorsement in blank, or special endorsement in the same manner and to the same extent as bills of exchange and promissory notes." Even conceding that the inscriptions set up in this case constitute an endorsement, as the same is known in law, it does not follow, from this provision, that the defendant is liable as contended for by plaintiff. The commercial law, or mercantile usage, which makes paper of a particular kind *negotiable*, and those which do more than simply

conclude the question of title, as by excluding equities, such as the one in question, or making an endorser a guarantor of previous signatures, or those requiring protest, notice, etc., are not one and the same thing. It, therefore, does not result, that, because for certain purposes, the legislature has extended the first mentioned of these rules, to cover bills of lading, that the others all accompany it. These laws are all exceptional, and are not to be extended by implication.

Furthermore, if the law holding an endorser as guarantor of previous signatures, is applicable in this case, equally so are all the rules of the commercial law governing bills of exchange and promissory notes. Hence, as strictly commercial paper must receive timely presentation and due protest in event of non-acceptance or payment, with immediate notice of protest to the endorser; all in order to hold such endorser; it follows, that to fix the liability of an endorser upon a bill of lading, there should be due demand with protest and notice, in case of non-delivery of the property covered. In this instance, the bill of lading was repudiated by the railroad company, and there was neither protest nor notice of protest, and none is alleged. Hence, plaintiffs evidently could have no remaining cause of action upon the endorsement as such.

When a party who has endorsed papers is released from his obligation, for failure to protest or notify, the release is complete. The effect is the same as though the signature had been stricken from the paper. Now, the guarantee of the genuineness of a bill forms a portion of the obligation of the endorser, as such; and when his contract is discharged by the laches of the holder of the bill, or otherwise, it perishes as to him *in toto*, and liability of every character is gone. It is difficult to comprehend upon what principle the responsibility of an endorsee should, in one respect, survive the discharge, while in all others it expires. The law, holding endorsers to a broad liability, compensates them for its exactions by throwing around their interests the most jealous safeguards. The fate of the bill must be determined without

delay; and if it go wrong, due protest must be entered, and immediate notice be given to the endorser. The object of these requirements is to afford the latter early knowledge of the dishonor, in order that he may protect himself, if possible. Whether the note or bill be rejected for lack of funds, or for fraud or forgery in its execution, protest is essential; and early notice is as necessary to the endorser in one case as in the other. It would be poor comfort to him who had been carelessly suffered to remain in ignorance, while the forger escaped in person and property, to say that he was released only as an actual party to the bill, but still held as guarantor of the verity of the forged paper.

The plaintiffs have evidently foreseen these difficulties and endeavored to elude them; for the petition is most carefully framed, and charges the defendant, not strictly as an endorser, but for the reimbursement of money paid in error. The allegations are that McCuiston was without general power to draw the draft in this case, having been paid solely upon the credit of the bill of lading, which was covered by defendant's guarantee; and said bill of lading, being a forgery, was paid in error, and that the amount so paid should be refunded by defendant, by reason of said guarantee. The positions plaintiffs thus attempt to assume are incongruous. If defendant is responsible as guarantor, its liability is to *make good the bill of lading;* and when plaintiffs seek to enforce such liability, the process has for its practical purpose the validating of that contract, and the upholding of the draft and of the payment made thereunder. The demand, however, for the reimbursement of the sum paid upon the draft, (and hence, constituting, as it were, the price by plaintiff given for the bill of lading) is an impeachment of the draft and its payment, and a repudiation of the bill of lading. This difficulty arises from the attempt to hold defendant, in any manner, *upon the draft itself.* If the agreement evidenced by this particular paper is to be annulled, directly or indirectly, there is a matter presented that does not concern the defendant, but McCuiston. The drawing of the draft was a proposition or request from the drawee to plaintiffs, for the payment of a certain sum for account of the

latter. The payment by Phelps & Co. was their acceptance of this proposal, made upon the representation of McCuiston that he had shipped cotton to cover, and completed the contract. If this agreement was null for fraud, forgery or misrepresentation, on the part of McCuiston, the demand for nullity and reclamation should not be directed against the payee, but against the dishonest drawer, with whom alone complainant had contracted. As to the holder of the paper, payment, which is the most emphatic of acceptances, admitted the genuineness of the bill, and operated as an estoppel.

It is evident, therefore, that plaintiffs' only recourse against defendant, if any existed, was upon the bill of lading, either to hold it (defendant) upon the endorsement, if any such there were; or, perchance, for damages.

Not having sued upon the said contract of shipment, Phelps & Co. should not recover; for, upon the draft in any shape, there is no cause of action against the Farmers' and Merchants' Bank.

Another difficulty presents itself in plaintiffs' path. If they can set up against defendant the guarantee of the bill of lading, there is opposed to this the guarantee and consequent estoppel, chargeable upon Phelps & Co., resulting from the payment of the draft, and covering the right of McCuiston to draw. The Bank was not held to know that the drawee honored the draft solely upon the credit of the shipment of cotton, and plaintiffs did not so inform them at the time of payment. In fact the shipper, in delivering the bill of lading, by writing thereon, required the Farmers' and Merchants' Bank to notify plaintiffs; and, as said McCuiston would have to have had some representative in this City to handle the cotton for him, had it been really shipped, the said Bank had a right to consider Phelps & Co. as simply such agent of McCuiston, and it was not bound to know or ascertain the rights of that firm or the nature of the contract it had made with its principal. The annexing of the bill of lading was demanded by the Farmers' and Merchants' Bank to secure itself upon its own advance; but it was not compelled to suppose that McCuiston was without funds or other credit in the hands of the

drawee. Under such circumstances the estoppel or guarantee against plaintiffs may well be considered the stronger; or, if they be of equal strength, then "*in pari passu, potior est conditio possedêntis (vel defendentis).*"

Finally, an examination of what is set up as an endorsement of the bill of lading, is no endorsement at all. The forged document purports to evidence a shipment of cotton to "order Farmers' and Merchants' Bank, notify John Phelps & Co., New Orleans." The consignee, thus constituted, placed upon the reverse of the paper the following inscription: "Pay to the State Nat'l Bank N. O., or order, *for collection*, on acc't of Farmers' and Merchants' Bank, Paris, Texas, C. W. Hertz, Cashier." This was not an absolute endorsement of the document, but a mere power of attorney to the State National Bank, or such as it might put in its place for that purpose, to collect or realize upon the bill. It was not intended to, and did not in fact, transfer title to the last named Bank or its order; and the latter, though in possession, had no standing as endorsee. Neither did it authorize the said Bank to place the name of its principal, by endorsement, upon the paper, or to transfer the title to any one, *as endorsee.* It authorized the agent to claim the cotton, at the port of destination, for account of its principal, or to surrender the bill of lading to the shipper, his agent or assignee, upon the discharge of the claim secured by the shipment. Let us suppose the collateral to have been a mortgage note, instead of the document in question in this case, which mortgage note was endorsed either in blank, or to the pledgee, at the time of the loan or advance. Let us suppose, further, that at the maturity of the principal obligation, the creditor sends it, with the accompanying collateral, to another city for collection, inscribing the said mortgage note to an agent in the same manner as has been done with the bill of lading in this case. The debtor, his agent or assign, in satisfying the principal debt, would be entitled to the collateral; but, would it be contended that the representative of the creditor, in making the surrender, could bind his principal as an endorsee upon the paper delivered up? Certainly not.

The State National Bank, however, in this instance, made no attempt to so bind its principal, the Farmers' and Merchants' Bank, when the draft was paid; it simply stamped draft and bill of lading, as follows: "State National Bank, New Orleans. Paid." This inscription was not in fact or intendment an endorsement, and the transaction was no more than a delivery of said forged paper to the party named therein, as one to be notified by the holder; such delivery being made when the claims of the holder were satisfied by the person thus indicated by the pretended shipper.

Surely there is no lack of reasons for reversing the judgment appealed from, and for rejecting plaintiffs' demand.

No. 74.

WIDOW L. SARAT *v.* WIDOW GEORGE L'HOTE.

1. Where a mortgage creditor has sold, at public sale, and bought in the sole property of an estate, retaining all, or a part of the price upon his mortgage claim, the widow and heirs, claiming homestead, may pursue such purchaser, so long as their claim is not barred by prescription, or otherwise abrogated.
2. The Article of the Civil Code, 1188, regulating the opening of dividends, is not applicable to such a case.
3. When the widow and minors occupy property of the estate, its rental value, during such occupancy, must be deducted from the homestead. 26 La. An. 539; 29 La. An. 412.
4. So, also, the value of household furniture appropriated to their use. 26 La. An. 539; 28 La. An. 638.
5. The admissibility of the inventory of an estate, as against a third person, questioned.
6. The widow and minors have not an untrammelled choice as to the particular fund or property out of which they will satisfy their claim. They are restricted to the proceeds of unencumbered property, where there is enough of such, and if not, must attack the junior mortgages, before seeking payment at the expense of older ones.
7. When seeking, as in this case, to appropriate all, or a portion of the proceeds of property specially mortgaged, the burthen is upon the widow and heirs to show the absence of other available property, not encumbered, or affected only by younger mortgages.
8. Where a party withholds documents, or evidence, which it was his duty to have

furnished, the presumption is that, if produced, they would have been unfavorable to him.

9. Where there are other causes justifying suspicion, a long delay in bringing suit may itself be considered as a suspicious circumstance.

Appeal from the Sixth District Court. Rightor, J.

J. A. Seghers for plaintiff.

W. E. Murphy for defendant.

McGLOIN, J.—André Dubuch died intestate, in this city, about September 12th, 1872, and his widow, plaintiff herein, qualified as administratrix of his succession and as natural tutrix of his children. He left movable and real property. There was also a policy of insurance upon his life, for five thousand dollars, standing in the name of one James Wood. In the inventory the widow declared that, although in the name of said Wood, the policy really belonged to the estate, and was in the name of James Wood only to secure him for premiums paid by him and subsequently reimbursed. The real estate was specially mortgaged to defendant, who, on January 20th, 1873, proceeded *via executiva* to sell the same, to satisfy her claim. It was sold, and bought in by plaintiff, bringing less than her mortgage, on the 24th March, 1873. On September 6th, 1875, plaintiff brought this suit, alleging that she, as widow of André Dubuch, and the minor children of her marriage with him, were, at the time of his death, in necessitous circumstances; that the succession of said Dubuch is insolvent; that there is no other available property but the real estate in question, to meet her demand, and that her privilege was superior to the mortgage of defendant, etc.

Defendant resists this demand on various grounds. In the first place, she contends, that it is now too late for the widow and minors to present their claim, the property in question having passed out of the succession, and its proceeds been distributed, without opposition or intervention on the part of plaintiffs. We do not consider this defence tenable. Had the fund realized by the sale of this property passed through the hands of an executor, curator, or administrator, been made the subject of a tableau

of distribution, duly published and homologated, and been thereafter distributed, no doubt, the widow and minors, like other creditors, would be affected by Article 1188, Civil Code, regulating the opening of dividends, and we would be called upon to determine its application. Here, however, the said fund did not pass into the hands of the representative of the estate, nor figure upon any account therein, and Article 1188 is clearly inapplicable. Under circumstances such as are herein presented, we see no valid reason why the widow and minors, so long as their demand be not barred by prescription, or otherwise legally abrogated, cannot pursue the fund, if affected in their favor, at any time after the sale. There is nothing in the nature of a judgment or judicial distribution to be disturbed, and the mortgage creditor is not injured and can find it no more unpleasant now to refund, than she would have considered it, had the proceeds been taken from her before they left the sheriff's hands.

In the case of Quertier & Co. vs. Succ. Hill, 21 La. An. 432, the Supreme Court said:—"They (the widow and minors) are not too late, so long as they have not concluded themselves, and the fund may be reached by them."

It is shown that the plaintiff and the minors resided in the property in question for six months and a half, after the death of Dubuch, and that the rental was worth forty dollars per month, and defendant contends that this should be deducted. The Supreme Court of this State has settled this issue favorably to defendant. Succ. Drumm, 26 La. An. 539; Succ. Marc, 29 La. An. 412. The object of the homestead is to sustain, for a time, at least, the indigent family of deceased persons; and shelter, according to their condition in life, is essential to their comfort. Whether the estate pay in money, what will secure such shelter, or furnish it in kind, can make no practical difference to the beneficiaries. This deduction would amount to two hundred and sixty dollars.

It is also conceded, that the widow has retained and applied to her own use, the household effects of the deceased, and it is urged that their value should also be deducted. This position is also

supported by the authorities. Succ. Drumm, 26 La. An. 539; Succ. Fontelieu, 28 La. An. 638.

There is a contest, however, between these litigants, as to the value of these effects. The inventory and appraisement in the succession fix their value at $214 15. Defendant objected to the admission of this inventory, upon the ground that it was *res inter alios acta*, and in its nature only binding upon such as the law requires to participate at its execution, and whose notification is directed by the Code.

Its admissibility, as against defendant, *and in the face of this objection*, would be questionable, were it not for the fact, that defendant has herself advanced this inventory, and its recitals, by way of estoppel, and she cannot be permitted to assume contrary positions upon the same matter; seeking at one time to introduce this instrument to our notice, and at another to exclude it. The defendant has submitted very strong evidence to fix a greater value upon this property, but we are relieved from the necessity of determining this issue, by controlling conclusions arrived at upon other points.

It will be observed, that the widow and minors here seek to satisfy their claim, not out of the general and unencumbered funds of the estate, but out of the proceeds of property affected by a special mortgage. We do not consider that the widow and minors have untramelled choice in this matter, and can arbitrarily select the funds or properties to be applied to the satisfaction of their privilege. Like other creditors, whose privilege covers both movables and immovables, they must look first to the unencumbered property, and can contest, with a mortgage creditor, over the fund or property covered by the mortgage, only when there are no other assets, unencumbered, or encumbered only by younger mortgages. C. C. 3269, 3270; Succ. Marc, 29 La. An. 414; Succ. Devron. 11 La. An. 482; Succ. Cerisé, 24 La. An. 96; Succ. Rousseau, 23 La. An. 1; Succ. O'Laughlin, 18 La. An. 142; Deverges vs. Creditors, 18 La. An. 169; Succ. Lauve, 18 La. An. 721.

As this right to compete with mortgage creditors is conditional

upon necessity, the party seeking to exercise it must, as in the case of any other remedy, arising only under particular circumstances, show that the condition exists; or, in other words, that there is no other property, unencumbered and sufficient to meet the claim. The furnishing of such evidence was recited as one of the necessary items of proof, furnished by the claimant and entitling her to the Homestead in Succession of Cerise, 24 La. An. 96.

We, therefore, consider that the burthen of proof was upon plaintiff to show that this policy of insurance for five thousand dollars was worthless to the succession, before she could reach the fund she is now pursuing. As administratrix, she sued the Insurance Company, and carried on the litigation for some time, and suddenly, before adverse judgment, and without any sufficient cause, apparent in the record of that suit, as furnished to us, discontinued the same. In the petition in that cause, she reiterated the statement made in this connection in the inventory. These were solemn declarations by the widow, administratrix of the succession and tutrix of the minors, made in face of two different courts of justice, that the insurance was an asset of the succession, nominally placed in the name of another; and whether conclusive upon the widow, or not, or upon the heirs, they furnish at least some proof of the facts declared. The evidence in that case, filed in this, also leads us to infer that these statements were correct, and that James Wood had a claim on said policy, for less than its face, if he had any at all. It shows, that about the time of taking out the policy, Dubuch bought a grocery store and its contents from Wood for $3,734.70, giving four notes, for something over $900 each, payable in three, four, six and nine months after date. He also leased from Wood the premises in which said grocery was conducted, for three years, at $2,400 per year, giving thirty-six rent notes of $200 each. There is no other transaction shown, between Woods and Dubuch, out of which a debt could arise, and we take it, that these were the debts to secure which the policy was executed. Yet, all of these

rent notes, duly cancelled, were produced, by the widow administering, and the three last of the notes, given for the store, were also produced. This would leave only the first of the series of the notes given for the grocery not accounted for, and in default of contrary proof, the inference is legitimate, that it was paid also, because the parties would certainly have concerned themselves about it, before attributing moneys passing between them, to so many notes of subsequent maturity. This would leave open only the premiums which Wood swears he paid, which could not have been for a very large sum, as Dubuch died in about two years after the execution of the policy.

Again, plaintiff in her petition in the suit against the Insurance Company, alleges that the old debt was paid, and that a new assignment of the policy thereafter made, to secure Woods in paying premiums. In this suit was offered, as evidence, the application for insurance. It was objected to, upon various grounds, and finally admitted by the court *a qua*, with the understanding that the policy itself was to be produced, or the application be stricken out. This promise was never complied with, either by original, or copy, or proof of contents and endorsements. The language of the petition against the Insurance Company, may be construed into a declaration that an agreement, or assignment, conserving the interest of Dubuch, was endorsed upon the policy itself. James Wood was placed upon the stand by plaintiff, and no proof was made by him, that he had applied to his own use, all the fund received from the policy. Neither did the plaintiff herself so swear, at any time, during the course of the litigation. We consider that it was the duty of plaintiff, as it was in her power to do, to throw full light upon the whole subject, and if she has abstained from so doing, the presumption is a legitimate one, that she was guided in such course by self-interest, and that the disclosures would have been adverse to her. N. O. Draining Co. vs. DeLizardi, 2 La. An. 288; Saulsbury vs. Ray, 7 Rob. 32; Winston vs. Prevost, 6 La. An. 164; Stocks vs. Ferguson, 10 La. An. 132.

At all events, the burthen of proof was upon her, to show, con-

trary to her solemn declarations, that this insurance was not an asset of the succession, and that she did not realize anything therefrom, before she can disturb defendant. This she has not done, but on the contrary, from all the circumstances of the case, we are led strongly to suspect, that her uncalled for abandonment of the further prosecution of the matter, was the result of some secret understanding, whereat a settlement of the controversy was arrived at, to her satisfaction.

The long delay in bringing this demand, while it may not have barred the suit, furnishes strong corroboration to this theory. The Judge *a quo* arrived at the conclusion that plaintiff was not entitled to recover, and we agree with him.

Judgment affirmed with costs in both courts.

No. 189.

SUCCESSION OF ANN MONAGHAN.

1. The appointment of one, upon his simple petition, and without publication, as dative testamentary executor of a succession, is null and void.
2. The same formalities must be observed in such a case as in that of the appointment of any other kind of administrator.

Appeal from the Civil District Court. Rightor, J.

John S. Tully for plaintiff, appellant.

A. J. Lewis for defendant.

ROGERS, J.—John K. Fitzgerald applied for letters of dative testamentary executorship of the Succession of Ann Monaghan and was appointed by the Judge on his simple petition. He proceeded with the duties of his office, and while seeking to have sold the property of decedent, was enjoined by Michael McAloone, who claimed the executorship by virtue of the will of decedent duly probated, and further alleging that he was a creditor.

He claims the appointment of Fitzgerald was an absolute nullity; his application to be appointed dative testimentary executor never having been advertised as required by law.

In King vs. Lastrappes, 13 La. An. 582, it was held, "the appointment of a dative testamentary executor, without notice of his appointment, was null." * * * "The same notice ought to be given for the appointment of dative testamentary executors, as for that of any other kind of administrators of an estate."

This is the law. No Judge can exercise his discretion independent of the forms and requisites of the law.

The right of either party before us to the execution of the decedent's will cannot be determined. Neither party has complied with the law. The judgment of the District Court is reversed and set aside, and the case remanded, in order that the proper proceedings may be had in the premises.

Appellees paying costs.

No. 209.

MRS. ANN MCCONNELL *v.* N. V. VINET *et als.*

1. Where, upon a judgment rendered *ex parte* taxing a curator's fee, a rule is taken for execution, such rule cannot be verbally changed into one to fix the value of such fee.
2. The first decree being *ex parte* was absolutely null and void, and it could not be validated by a subsequent decree affirming and maintaining it.
3. District Courts are courts of record, and consents and proceedings therein, not reduced to writing or made to appear in some of the modes pointed out by law, will be disregarded.
4. The suggestions of the Judge *a quo* of *verbal* proceedings had in the course of a controversy before him, will be ignored.

Appeal from the Civil District Court. Rightor, J.

Sambola & Ducros for plaintiff in rule, appellee.

J. Magioni for defendant.

ON RULE OF CURATOR *ad hoc.*

ROGERS, J.—In a suit between plaintiff and defendants, Jno. S. Tully, Esq., was appointed curator *ad hoc* to represent an absent defendant.

Judgment was rendered in favor of plaintiff, and after the same had become final, the curator *ad hoc* moved the court to award him five hundred dollars for his fee as curator. and that the same be taxed as costs. The motion and order granted thereupon were *ex parte.* Two months after this proceeding the curator entered a rule praying a writ of execution for said $500 against Ann McConnell. the plaintiff in this suit. To this plaintiff excepted, for reason among others, that the order rendered was *ex parte*, null and void, and made without citation to anyone.

The District Judge held, that the order granting the curator *ad hoc* five hundred dollars was null and void, having been rendered *ex parte*, but inasmuch as, when the rule to issue execution against plaintiff was, after due notice, fixed and entered for trial, the curator *verbally* moved in open court to convert the rule from one for execution into one to fix the value of services, and offered evidence to support the value of his services, and that plaintiff's objections to such a proceeding were not valid in law, decided that he, the Judge, was competent to fix the value of services which had been rendered *pro tribunali*, and therefore decreed that the exceptions of plaintiff be overruled, and that the judgment heretofore allowing the curator *ad hoc* five hundred dollars, be maintained and confirmed and that execution issue in default of payment thereof.

We do not agree with the District Judge. We are at a loss to understand how a judgment absolutely null and void can be made one of binding force by a subsequent decree maintaining and confirming it. The record affords no evidence that there was any consent to change the proceedings, or that any change took place. The Civil District Court is a court of record, and the suggestion of the Judge, in his reasons for judgment, that a verbal motion was made in open court will not be noticed by us. The record should, in the proper legal mode, show and preserve all proceedings had, and those proceedings should have been reduced to writing or made to appear in a manner recognized by law. 1 McGloin, 251, Dours vs. Cazentre.

That the original *ex parte* order fixing the fee of the curator was

null and void, there is no doubt. 1 McGloin, 313, Wood vs. Howard; 30 La. An. 1026, State vs. Judge; 13 La. An. 150, Fletcher vs. Henley.

The subsequent proceedings did not make it valid, and the rule for execution should have been refused, as there was no judgment upon which to base such an order.

It is, therefore, adjudged and decreed that the judgments rendered in this matter on June 28, 1882, and on February 5, 1883, be reversed and set aside at appellants' cost.

No. 160.

Succession of Marie Saux, Wife of Jean Marie Tujague.

1. Where property has been sold under order of court, and a rule has been taken to erase a mortgage affecting the same, the question of appellate jurisdiction is determined by the amount of the mortgage, and not by the value of the property.
2. Where a community has been dissolved by the death of the wife, the surviving husband remains personally bound for the community debts; and the community creditors may have recourse against him and even levy upon his individual property.
3. The surviving husband, therefore, retains full control of the community property, and settles its affairs.
4. In such a case, until the community debts are paid, the heirs of the deceased wife have no absolute interest in the community property; no interest which can be legally recognized.
5. The community creditor, in such a case, may proceed against the community property without regard to the death of the wife.
6. Hence, the court having cognizance of the wife's succession cannot force such a creditor to release such property from a seizure he has caused to be levied, nor can it order the erasure of such creditor's judicial mortgage.

Appeal from the Civil District Court. Tissot, J.

Sambola & Ducros for the succession.

J. O. Nixon, Jr., for appellant.

Rogers, J.—Marie Saux, wife of Jean Marie Tujague, died in this city on September 30, 1881; there existed between her and

her surviving husband a community of acquets and gains. After her death, R. M. Flaut, the appellant, instituted suit against Tujague, the surviving husband, and obtained judgment against him on December 2, 1881, for $700. The obligation sued on was a debt due by the community. Appellant issued a writ of *fieri facias*, and to make the amount thereof seized real estate, inventoried as community property and appraised at $3,500.

Tujague had obtained letters of tutorship of his minor children, and by virtue thereof (*ex-officio*) administered the estate of his deceased wife; he obtained from the court an order of sale and had the property advertised. It was adjudicated at public auction for $3,500. The judgment in favor of Flaut having been recorded, operated as a judicial mortgage, and this fact, together with the seizure by writ of *fieri facias*, prevented the transfer of the property.

Tujague took a rule to set aside the seizure and to erase the inscription which operated as a judicial mortgage.

The proceeding by Flaut against Tujague was before one Division of the Civil District Court; the rule was taken by Tujague in the succession proceedings pending before another Division of that Court. The rule was made absolute, cancelling the seizure and ordering the erasure of the judicial mortgage. Flaut appeals. The questions resulting are:

1st, urged by appellee.

This Court is without jurisdiction because the amount really in question is the value of property worth $3,500. It is true the rule taken by appellee is in a proceeding where he seeks to effect a title to real estate of that value; but the issue that he brought about bore in no manner upon the title or value of the property, beyond the question of the judgment for $700, which appellee says is not disputed.

We are to determine whether the judgment of $700 is a judgment for which the community of Tujague and his late wife is responsible.

Whether it was proper for the Judge *a quo* to order the erasure of a mortgage of $700.

Whether a writ of *fieri facias*, based on a judgment, by a competent court, for $700, can be stayed and annulled on a simple rule to show cause by a Judge occupying and exercising a different jurisdiction.

These are all questions within the scope of our jurisdiction. We therefore refuse to dismiss the appeal; 33 La. An. 1351.

2d. What was the effect of the death of wife as to the rights of a community creditor to proceed against the surviving husband, and to seize the community property in satisfaction of his judgment. In Hawley, Public Administrator, vs. Crescent City Bank, 26 La. An. 232, the Supreme Court say:

"Upon the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community debts is not changed. He is absolutely and personally bound for their payment, and his separate property may be seized and sold for their acquittal. This being his position, he has under his control the community property which, by law, is expressly subjected to the payment of the community debts, and he has, so far as the final settlement and liquidation of the community after its dissolution is concerned, the same rights he had during its existence, because he is, after the dissolution, under the same responsibilities for the community debts that he was before the dissolution. It is but just that he should have those powers. *The community property continues under his control until the debts are paid.* Until their final settlement and discharge, the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain, until, by the result of the final discharge of all obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased spouse. This doctrine has been uniformly recognized in our jurisprudence, as appears from a long chain of decisions," and the Court refer to 24 La. An. 534, 543; 25 La. An. 379; 25 La. An. 314; 23 La. An. 424, and to which authorities may now be added 26 La. An. 391, and Succession of Cason, 32 La. An. 792. In the latter, recently decided,

the Court say; "As to the community creditors, they are under no necessity to provoke its liquidation through the medium of the wife's succession, because it is settled they may disregard the wife's interest, and proceed directly against the community property in the possession of the husband, contradictorily with him alone."

"In the case of the dissolution of the community by the prior death of the wife, her succession or heirs have no valuable interest in the community property."

It is true, as contended by appellee, that "this legal or conjugal partnership is a legal entity; a partnership *sui generis;* that it must be considered as an ideal being, *être moral*, distinct from the persons who compose, having its rights and obligations, its assets, its liabilities, its debtors and its creditors;" 6 La. An. 441; but as it is a partnership created by express law, and not the result of a convention by consent of parties, it must be controlled in its effects by the express and peculiar provisions of law regulating it, C. C. 2807, declares the community of property created by marriage is not a partnership."

While, therefore, it partakes of the nature of a partnership, there are "*very marked and* distinctive differences" between it and the rules governing partnerships. This, at once, declares itself from the position and rights of the husband in and to the community property.

He is the head and master of the community. He administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without the consent and permission of his wife.

C. C. 2404. And further, both the wife and her heirs may exonerate themselves from the debts contracted during marriage by renouncing the partnership or community of gains. C. C. 2410.

These conditions flow from a definition given in the Civil Code to this community or partnership; it is a "community of property created by marriage," and is not a partnership; *it is the effect*

of a contract governed by rules prescribed for that purpose in this Code." C. C. 2817.

The authorities cited by appellee do not overrule these views; on the contrary, they are in full harmony with them.

It is not necessary to consider the other point raised by appellant. We are satisfied the District Judge erred in setting aside the seizure made by Flaut, by virtue of his judgment, and in the erasure of the inscription of his mortgage.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be reversed, and it is now ordered that the rule taken by Tujague on February 7, 1882, be dismissed, with costs in both courts.

THOMAS J. DYER *v.* MRS. ELIZABETH RATLIFF.

1. The husband, appointed agent of his wife from whom he is legally separate in property, is a competent witness in her behalf in regard to all matters connected with his gestion.
2. The prohibitory clause in Article 2281 (2260) of the Civil Code does not apply to husbands when testifying in their capacity of agents for their wives.
3. The legal relationship of the husband towards his wife may be dual; the one marital, and the other fiducial.
4. By virtue of the law of agency the husband derives his authority to testify for or against his wife, limited however to matters arising from and embraced and limited strictly within the sphere of his agency.
5. In order to fully harmonize laws apparently conflicting, Article 2281 (2260) of the Civil Code must be accepted in a purely restrictive sense, and interpreted so as to apply to husbands in their strictly marital relationship towards their wives.

Appeal from the Twentieth Judicial District Court of the Parish of Assumption. Knobloch, J.

Walter Guion, for plaintiff and appellee.

Pugh & Howell and *Taylor Beattie* for defendant and appellant.

BLAKE, J.—Plaintiff sues to recover his entire year's wages as overseer, for alleged violation of contract on the part of defendant, in discharging him without good and sufficient cause.

Defendant pleads that there exists a reconduction of contract,

dating back three years, under which the right to discharge, without excuse, is specially reserved.

Defendant's husband, who is likewise her agent, (she being legally separated in property from him) was permitted to testify without objection.

It was urged that the husband's testimony, being in direct violation of a prohibitory law, was of no weight, and should be entirely disregarded by the court in summing up the evidence.

The court so held, and decided this case with the testimony of the husband and agent entirely eliminated.

Judgment having been rendered in favor of plaintiff, defendant has appealed.

We are urged by the plaintiff to disregard entirely the testimony of W. B. Ratliff, the husband and agent of defendant, for the reason that, as husband, his testimony is absolutely null, the same being in violation of a prohibitory law, and it should for that reason be entirely eliminated from the record.

Article 2281 (2260) of the Civil Code declares " that the husband cannot be a witness for or against his wife, nor the wife for or against her husband," and we have been referred to 32 La. An. 645; 11 La. An. 626; 23 La. An. 747; 24 La. An. 401; 30 La. An. 1293, as adjudications declaring this law prohibitory, and as having been prompted by motives of public policy and morals, and we have been told that the law makes no distinction or exception in favor of the husband who testifies to facts which arose out of his agency for his wife; but, at the same time, that this rule does not include the declarations of the husband, when acting as agent of his wife, which, when testified to by another witness than the husband, are admissible against the wife, citing Wharton Ev. 1214; Barataria Company vs. Field, 17 La. An. 421; Bodecker vs. East, 26 La. An. 210.

It is incontrovertible that in the simple relationship of husband and wife, neither can be a witness for or against the other, under the plain prohibition of the Code, and to that effect do we recognize the application of the authorities to which we have been referred; but the question which arises in this case is, does that

prohibition apply where a distinct legal relationship is shown to exist between husband and wife, such, for instance, as that of principal and agent, as is the case here?

It will be perceived that the legal relationship of the husband towards his wife may be dual, the one marital and the other fiducial, as in this case, with laws peculiar to and governing each distinct relationship; and it follows, that it is only when the husband acts within the sphere of any one of said relationships and with reference to the law governing the same, that his acts become legal and binding on his wife. And it is in keeping with this principle that we find the application of the authority in 17 La. An. 246, and which has its source in the law of agency, where it was held "that the declarations of the defendant's husband, separated in property, but acting as her agent, made in relation to the management of her affairs, is admissible as evidence against her."

It will not be denied that the wife who has control of her paraphernal property, or who is separated in property from her husband, can appoint an agent to manage her affairs, and it will also be conceded that she can confer this appointment on her husband if she chooses, there being nothing in our laws which prevents her from doing so—and that the acts of her agent, be he a stranger or her husband, are alike binding on her—that this new relationship created between spouses is governed by the law of agency, and that the law makes no distinction, exception or reservation whatever, when this authority is conferred on the husband.

We can conceive of no sound reason, in law or logic, why the husband, in the discharge of his duties as agent and acting within the scope of his authority, should be prevented from testifying, because of the fact of being also husband he is disqualified under the prohibitory clause of Article 2281 (2260) of the Code.

To hold the husband to the inhibition contained in said Article may not unfrequently work great wrong and hardship to the wife. According to the doctrine in 17 La. An., his declarations as agent, testified to by a third party, must remain binding on her,

without any possibility of escape, since she is prevented from availing herself of the sworn statement of the same agent to rebut or contradict the same, because of their marriage relationship, his lips being closed by the inhibition referred to, and this will be the inevitable result should the doctrine be laid down, that no possible change in the legal relationship between husband and wife will do away with the inhibitory clause in the Article of the Code referred to.

Besides, it must be borne in mind that since the decision in 17 La. An., the rules of evidence have been enlarged by amendment of Article 2260, so that the wife joined in the same suit with her husband is now a competent witness in behalf of her separate interest; and it would seem logical to hold that, as regards that separate interest, what she can do directly she can do indirectly. and be heard through her agent, whose acts are hers, according to the familiar maxim, *qui facit per alium, facit per se*, and particularly when the husband acting as such has no conflicting interest.

Even if this is a doubtful case, the same should be sanctioned by the "*argumentum ab inconvenienti*," which is of great weight here.

It is, therefore, more in consonance with reason and common sense, and in harmony with the spirit of the law, to hold that under the full authority of his agency, the husband becomes, by virtue of the law of his creation and by which he is governed, a competent witness in relation to matters appertaining to his gestion, and in order, therefore, to harmonize laws apparently conflicting and contradictory, it is better to subject the Article of the Code to a rigid construction and declare the same to refer to spouses in their strict marriage relationship and not to apply to a different legal relationship, which the law sanctions and authorizes, and which has been created by the parties themselves.

Judgment reversed.

No. 194.

STATE *ex rel.* JURY COMMISSIONERS *v.* MAYOR AND ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

1. While courts must be slow to declare a statute unconstitutional, and should seek for interpretations which shall preserve such statute, yet to uphold the fundamental law and prevent its violation is a solemn judicial duty.
2. Constitutions are interpreted according to the general rules of the law of interpretation, being in this respect upon the same footing as ordinary statutes, contracts, judgments, etc.
3. In all such cases the aim should be to arrive at the *intent* of the law maker, the contractants, or the Judge, as the case may be.
4. The principle first laid down in syllabus No. 1, means no more than that, in cases of doubt between two interpretations, either of which may be reasonably accepted, the courts will adopt the validating interpretation.
5. In determining, under Art. 48, Const. of La. of 1879, whether an act be *local* or *special*, we should not confound in meaning these particular terms named, with the terms *general* and *public*, on the one hand, and *special* and *private* on the other.
6. The word *local*, as used in Const. Art. 48, is not synonymous to either of the words *private* or *special*.
7. The question whether a statute be *local* or *general* is a question of *place* only.
8. Courts of Justice, when interpreting, must give, if possible, effect to every word.
9. The fact that a statute applies to matters of public concern does not necessarily prevent such statute from being *local*, within the meaning of Art. 48.
10. The motives or intent of the Constitutional Convention given, in adopting Arts. 46 and 48.
11. The Act No. 117 of 1882, increasing the salaries of the Jury Commissioners for this Parish, is *local*, within the meaning of Art. 48, Constitution of La., and not having been published in accordance with the provisions of Art. 48, it is null.

Appeal from Civil District Court, Division D. Rightor, J.

Alexander Walker for relators.

C. F. Buck and *Wynne Rogers*, City Attorneys, for respondents, appellants.

McGLOIN, J.—Relators, John L. Lewis, Paul Waterman and L. Placide Canonge, constitute the Board of Jury Commissioners for this parish; said board being created by Act No. 98 of 1880, and its duty being to draw and furnish the names of jurymen who are to serve in the various District Courts of this parish. By the

said Act, each of said Commissioners was entitled to compensation at the rate of fifty dollars per month. The Act, No. 117 of 1882, increasing the salary of relators, and upon which they rely in this action in order to compel respondents to budget and pay their claim for such salary at the increased rate, is short and as follows:

"Be it enacted by the General Assembly of the State of Louisiana, that section 2, of Act No. 98 of the session of 1880, be so amended as to read as follows, to-wit:

"That each of the Jury Commissioners created by said Act shall receive a salary of twelve hundred dollars per annum, payable monthly by the City of New Orleans."

Article 48, of the Constitution of 1879, is as follows:

"No local or special law shall be passed on any subject not enumerated in Article 46 of this Constitution, unless notice of the intention to apply therefor shall have been published, without cost to the State, in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the same manner provided by law for the advertisement of judicial sales. The evidence of such notice having been published shall be exhibited in the General Assembly before such Act shall be passed, and every such Act shall contain a recital that such notice has been given."

The Act in question contains no recital of publication, and it is conceded that publication was not made.

Respondents aver that this Act is special and local, and hence within the purview of this constitutional prohibition, and so absolutely null and void.

The relators seek to meet this objection by advancing the following propositions:

1st. That the Courts must be slow to declare a law void for unconstitutionality; that they must seek, if possible, an interpretation of a constitutional clause, which will preserve, rather than one which will destroy it. In support of this is cited,

1 Bouvier, 337; 3 Den. N. Y. 381; 1 Cowen, N. Y. 550, 556; 20 La. An. 587; 3 Martin La. 12; 4 Martin La. N. S. 138; 5 Rob. La. 383; 8 La. An. 441; 9 La. An. 562.

2d. That the Board of Jury Commissioners constitutes a portion of the machinery of the political government of the State, contributing to the efficient working of certain of its Courts of Record, before which Courts the citizens of every section of the State may appear in order to enforce their rights, and which protect the persons and property of all, resident or stranger, who may be found within the limits of their jurisdiction; that hence, statutes regulating the duties, etc., of said board are of interest to the entire people of the State, and cannot be considered as either local or special.

I.

We recognize the force in general of the first proposition laid down by the relators; but, at the same time, we are aware that this rule has its limit. The Constitution is the highest law of the State, and it calls with particular emphasis for recognition and obedience. While respecting fully the dignity and authority of the legislative department, the judiciary must, at the same time, remember that it has upon it the solemn duty of upholding, within its sphere, the fundamental law, and of seeing that its provisions are not violated directly or indirectly. We understand the rule to be, that, in interpreting Constitutional legislation, the Courts must be governed by the general principles which, applicable in all endeavors at interpretation, whether the thing to be interpreted be a contract, a judgment or a statute. 13 La. An. 345.

The cardinal principle is, that in all such cases the *intent* is what must be sought for, and which, when found, must be enforced. In seeking for this *intent*, certain rules are available, but none of these rules can be employed for the purpose of defeating the *intent*, or, in other words, of repealing or altering the scope or effect, either of the judgment, contract or statute.

The principle laid down by the relators in their first proposition therefore, when properly restricted, means only that in cases

of doubt, and, as between two interpretations, either of which may be reasonably accepted, the courts will adopt the one which maintains the questioned statute, or, in other words, the one which does not impeach the legislative wisdom, and which the less circumscribes the legislative power.

II.

In seeking the intent of the framers of the Constitution, as the same is embodied in Art. 48 of that instrument, we have come to the conclusion that the Act 117 of 1882, is one which comes within its purview. In solving this question we have striven to find the meanings which were sought to be conveyed by the word "*special*" and by the word "*local*," as these have been employed in this constitutional provision. We may well question the propriety, in the particular connection under consideration, of confounding entirely the words "*general*" and "*public*," on the one hand, and the words "*special*" and "*private*," on the other. We say *in this connection*, because this confusion grew up originally out of the mere application of the rule of evidence, which obtains on the case of proving statutes before Courts of Justice; those of one class having to be affirmatively established, and those of the other being noticed by all judicial tribunals, without proof. In considering such a question, nicety of distinction in the use of terms was not so essential, but where it becomes a matter of placing limits to the legislative or other power, as it has come to be under recent American Constitutions, a greater strictness should prevail.

It is, however, upon the meaning of the word *local* that we prefer to rest our decision. This certainly is not the synonym of *private*.

Webster defines the word *local* as follows:

"1st. Pertaining to a place, or to a fixed or limited portion of space. We say the *local* situation of the house is pleasant. We are often influenced in our opinions by *local* circumstances.

"2d. Limited or confined to a spot, place or definite district; as

a *local* custom. The yellow fever is *local* in its origin, and often continues for a time to be a *local* disease.

"3d. In law, *local* actions are such as must be brought in a particular county where the cause arises, distinguished from transitory actions. Blackstone."

Under none of these definitions can this word *local* be held to be the same, in meaning, as either of the words "private" or "special." Taking definition No. 2, we find it particularly applicable; and, in fact, the distinguished lexicographer might well have used, in the example given, the word *law* instead of *custom*. Therefore, whether the statute, or other thing, be *local* or *general*, has nothing to do with *persons*, but with *place* only; and it would be as reasonable to argue that, because the yellow fever has in fact a partiality for the strangers within its reach, rather than for residents, it cannot be a *local* disease, as to contend that laws regulating the particular concerns of this parish are not local, because strangers coming within the limits thereof are, during their stay, governed thereby.

The framers of the Constitution seem to have been careful in the verbiage of this Article, and they have excluded the idea of synonomy between the words "special" and "local," as these are made use of, for we find them disjoined by the conjunction "or."

If the word "*special*," be taken as the equivalent of "private," or rather as the opposite of "general," so far as this latter term applies to subject and not to place, then it alone expresses the restriction as the same is contended for by relators. When, however, the Convention added "*local*," disjoined from "*special*," it certainly intended to convey, by the addition, a separate, distinct and independent idea, and Courts of Justice are bound to give effect to every word as it is written, where this is at all possible, for they should presume that every such word was rightly used and had a purpose. Under the circumstances, certainly, even if we could at all do so, we cannot hold that *special* and *local*, both expressed but one and the same idea, and that we have here only a piece of useless and stupid repetition.

But if we admit this to be a case of doubt, and, as directed by

La. C. C., Art. 17, we turn to other Articles of the Constitution bearing upon this subject, and which are in *pari materia*, we are rewarded, as it were, by a flood of light.

Art. 46 of that Constitution has this opening:

"The General Assembly shall not pass any *local* or *special* law on the following specified objects:" etc.

After this comes a list of subjects, among which we may mention the following:

"For the opening and conducting of elections, or fixing or changing the places of voting."

"Changing the venue in civil or criminal cases."

"Authorizing the laying out, opening, closing, altering or maintaining roads, highways, streets or alleys, or relating to ferries and bridges, or incorporating bridge or ferry companies, except for the erection of bridges crossing streams which form boundaries between this and any other State."

"Remitting fines, penalties, and forfeitures, or refund moneys legally paid into the treasury."

"Authorizing the construction of street passenger railroads in any incorporated town or city."

"Regulating labor, trade, manufacturing or agriculture."

"Creating corporations, or amending, renewing, extending, or explaining the charter thereof; *provided*, this shall not apply to the corporation of the City of New Orleans, or to the organization of levee districts and parishes."

"Extending the time for the assessment or collection of taxes, or for the relief of any assessor or collector of taxes from the due performance of his duties, or of his securities from liability; nor shall any such be passed by any political corporation of this State."

"Regulating the practice or jurisdiction of any court, or changing the rules of evidence in any judicial proceeding or enquiry before courts, or providing or changing methods for the collection of debts, or prescribing the effects of judicial sales."

"Exemption of property from taxation."

"Fixing the rate of interest."

"Concerning any civil or criminal actions."

"Regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes."

"Legalizing the unauthorized or invalid acts of any officer, servant, agent of the State, or of any parish or municipality thereof."

The subjects here selected form by far the greater portion of all that are enumerated in Article 46, and yet they relate, every one of them, to matters of *public* concern, and many of them far more clearly so than the mere question of an increase of salary to the Jury Commissioners of this parish. And yet, the framers of the Constitution of 1879 evidently considered that, despite their being of *public interest*, legislation upon them might be "*local* or *special*."

If, turning to Article 18 of the Civil Code of this State, we seek there one rule of interpretation, and strive to ascertain the "reason and spirit of it (the law), or the cause which induced the legislature to enact it," we must arrive at the same conclusion.

The purpose of the Convention, in adopting Article 46, was to render effective certain radical changes from former Constitutional legislation which had been made in the provisions creating and governing the Legislative Department. That Convention was a body elected by a people that had been suffering long from high taxation, resulting from the lavish expenditures, in times that had gone before, of the public moneys. The members assembled with the determination of reducing the tax burthens, and to accomplish this, they were compelled, of course, to direct their efforts to the task of reducing the governmental expenses. Hence, we find a reduction in the number of the public offices, and a wholesale reduction of official salaries. It was found, however, that the Legislative Department was a great consumer of public money, which went legitimately for pay of members, employes, for printing, stationery, etc. By providing that the regular legislative sessions should be biennial, instead of annual, as they

had been before, the item of legislative expenses was reduced one-half. Carrying on the work of reform still further, they restricted the length of all regular sessions, except the first, (Art. 21) to sixty days; and by this means a further reduction was secured.

Having thus attempted economy by curtailing the time to be devoted to legislation, they thereby rendered the time that had been actually given, itself precious, and a matter to be guarded against all wastefulness. It would have been poor wisdom, in order alone to save money, to have allowed too short a period for necessary legislation. Therefore, the question of economizing every moment of these sixty days in every two years became important.

Experience had taught them that it was the *private* or *special* bills, with the *local* ones which crowded the legislative calendars and consumed the legislative time; and they felt that if no restriction were placed upon the introduction of such bills, these latter would possibly consume all or a greater portion of the short period allowed, to the exclusion of general legislation; or, at best, that special or local bills would so distract and overwhelm the members, that general legislation would suffer by not receiving due consideration and thought. They considered that in the great majority of cases, general legislation could be made to apply, and hence selected the twenty-one subjects enumerated, and excluded upon these all special or local legislation. In view of such considerations, it becomes clear that the danger to be guarded against, was one more apt to arise in connection with bills in which there was a general public or interest, than with those in which there was only a particular or individual concern. Hence it is, that among the subjects upon the list, the great majority are those of a *public nature*, though not necessarily of a *general one*.

In the enactment of Article 48, there was, in addition to this one, another purpose. It was complained of, that, in the past, it had been not uncommon for particular citizens of certain localities to appear before the Legislature, either with or without the conni-

vance of the members representing their localities, and secure legislation affecting particular parishes, towns or neighborhoods, without its being known to the body of their neighbors that such legislation was to be applied for; or, at all events, without a fair opportunity for full discussion and presentation through the press and before the Legislature itself of all interests concerned. Thus, it was said, that the people went to sleep in a parish or town, to awake next morning finding promulgated the sundering of their old parish, or a change of the county seat, or the closing of a road or stream, etc., to which alterations they might have been opposed. To avoid this, and in order to afford fair warning in such cases, the Article 48 was adopted, requiring due publication in the localities to be affected, of local or special laws, so that the opposition if any there was to a proposed measure, might be notified and allowed to defend its interests or views, as it considered best.

In view of these facts, it was surely not statutes simply incorporating some village fire company, or establishing a rural literary society that were to be dreaded and to be guarded against with such jealous care.

Clauses somewhat similar to those under consideration are to be found in the Constitutions of some of our sister States. In discussing the decisions in Wisconsin and New York under such provisions, Mr. Sedgwick, in his work on the Construction of Statutory and Constitutional Law, (Ed. 1874, pp. 528, 529, note) has the following:

"It is settled, that if the statute be either *local* or *private*, the requirement as to title applies; that is, if *the Act be local as to territory, no matter how public it may be in its character, it can contain but one subject*," etc.

So, in note *A* to pages 534, 535, of the same work, we find other authorities to the same effect, among which the following:

"A Statute providing for the compensation of county officers has been held *local*. State vs. The Judges, 21 Ohio, N. S., 1."

"An Act regulating the fees of an officer was held not to be *general*. Ryan vs. Johnson, 5 Cal. 86, and see Henry vs. Henry, 13 Ind. 250."

Our attention is called to a number of statutes passed during the session of 1882, which, it is claimed, will be affected by a decision upon this issue adverse to the particular statute under consideration. Had the question not been forced upon us so squarely as to be beyond fair avoidance, we might have abstained from expressing the views here given forth. As it is, however, we are sworn officers of the State, with certain duties to perform, and these we must accomplish according to our consciences, and regardless of consequences. We do not say that there are other statutes so affected, for we have no right now to consider, much less to determine such a question, but even if so it were, the greater and more universal the violation of the Constitution, the more certain and emphatic becomes the duty of the judiciary to speak forth in its vindication.

Judgment reversed and application for a mandamus dismissed; relators to pay all costs.

No. 195.

ALLEN, WEST & BUSH *v.* NEW ORLEANS INSURANCE COMPANY.

1. Where a party applying for insurance upon a Flour and Grist Mill and Cotton Gin, has in his answers declared that the lights used were candles in a lantern and these rarely, and that the premises were used only in the daytime; and where also the policy stipulates that if the property insured be a manufacturing establishment, to run it at night, during extra time, or without a special, endorsed agreement to that effect, vacates the policy—held, all of this constitutes a warranty.
2. Under such a policy, the insurer is not liable for a loss occuring in the night time during the course of the unauthorized running of the Gin.

Appeal from Civil District Court. Monroe J.

Miller, Finney & Miller for plaintiffs, appellants.

Leovy & Kruttschnitt for defendants.

ROGERS, J.—The plaintiffs bring suit to recover the amount of a Policy of Insurance executed by defendants on a three-story

frame building, occupied as a flour and grist mill and Cotton Gin situated at Dyer's Station in the State of Tennessee. The property insured was destroyed by fire on November 13, 1879, at eleven o'clock at night.

In the application for insurance made by the insured, we find the following answers made to questions propounded:

Q. Lights—if lamps, are they metal or glass?

A. Candles in lanterns, but scarcely ever used.

Q. During what hours are the premises worked?

A. Only during the day.

There is no difference between counsel on the fact that the application forms part of the contract evidenced by the policy issued upon and after this application, and the question is virtually: do the above questions and answers constitute an affirmative or promissory warranty? In order to ascertain the intent of both parties to this contract, the instrument itself must aid the investigation, for the authorities cited by both counsel propound distinct and undoubted principles of law. We find no conflict in the law quoted, and if the issues depended entirely on the questions and answers we have quoted above, it would be necessary to inquire into the weight of authority urged by them.

It is evident that the inquiry as to the hours during which the mill was operated had more than a mere affirmative significance, for we find a condition of warranty attached to the policy in the following words:

"If it be a manufacturing establishment, running the whole or in part over or extra time, or running at night, without special agreement endorsed on this policy, this policy shall be void."

The object of the application for insurance was for the benefit of both parties and it contained all the data necessary to complete a perfect contract, and the acceptance of the risk by the Company and the policy by the defendant after his application, expressly declared, "that running at night without special agreement endorsed on the policy," vacated the policy.

No other reasonable conclusion can be reached than that it was contemplated by both parties that the mill would be oper-

ated during the day, as it was at the time of the application, and that if it was to be run over or in extra time or at night, an express agreement should be made and evidenced by endorsement on the policy.

In thus following the precise terms of a contract, perfectly unambiguous in its provisions, we can more certainly do substantial justice between parties than by relying upon what at best must be very unsatisfactory, when drawn from a construction upon the meaning of language used in the instrument, after the happening of an event that was probably not considered originally, certainly not by the insurer, who declared in his application that lights were seldom used and the mill only run during the day, and accepted a policy which acquired a specially endorsed agreement for running at night.

Judgment affirmed.

GARRETT & COTTMAN *v.* JAMES TODD.

1. Defendant, who sets up a reconventional demand against the action of a non-resident suitor, under the provision of Article 375 of the Code of Practice, and which demand is not connected with or incidental to the main cause of action, becomes, as to such demand, a plaintiff, and the same strict rules of practice apply to him as to a plaintiff in any ordinary action.
2. It matters not the *name* parties may give to their pleadings. Courts will look to the *substance* thereof, and determine accordingly.
3. When, under the guise of a reconventional demand, a plea in compensation is clearly disclosed, and an attempt is made to introduce proof to establish the same, and the tendency of which is to subject the liquidated demand of the plaintiff to the unliquidated claim set up by defendant, the proof, not being of equal dignity, will be refused.
4. The rule is without exception, that an unliquidated claim cannot be pleaded in compensation against a liquidated demand.

Appeal from the Nineteenth Judicial District Court, Parish of St. Mary. Goode, J.

Don Caffery for plaintiffs.

Foster Brothers for defendant, appellant.

DUMARTRAIT, J.—This action is based upon an unconditional obligation, in the form of a promissory note, executed by the defendant, and payable to the order of the plaintiffs.

Defendant, by way of defense, pleads that the note sued on, was given plaintiffs with the understanding that the same should be subject to a future settlement between them, he, defendant, having assumed to pay a certain indebtedness of Hine & Co. to plaintiffs, and having moreover certain claims against plaintiffs, growing out of certain transactions as their agent, in selling and disposing of plows for their manufactory, for commissions for collecting certain debts due them, etc. The claim of defendant is set up in the form of a plea in reconvention, which he claims he has a right to urge under Article 375 of the Code of Practice.

The plaintiffs being non-residents, we concede to the defendant his right to set up a reconventional demand under said Article cited.

The question, however, to be determined in this case is as to the correctness of the ruling of the Judge *a quo*, in refusing to admit parol evidence to "change, vary or alter the terms of a written agreement;" these are the words of the bill of exception before us, as to the ruling of the court.

We consider the ruling correct, as no evidence is allowable to prove the validity of an unliquidated claim as against a liquidated and absolute obligation to pay unconditionally, as represented by the note sued on in this instance.

Judgment affirmed.

ON MOTION FOR A REHEARING.

BLAKE, J.—It is evident that the appellant has not seized the full scope and meaning of our decision.

The question involved is not as to whether, under the provision of Article 375 of the Code of Practice, a party defendant, who, having formulated his reconventional demand, should not be permitted to establish his claim by the same species of evidence as a plaintiff in any ordinary action is entitled to do, but relates to a

principle of the law of evidence governing pleas in compensation, and to the sufficiency of proof.

It matters not what names are given to pleas, the substance of the pleadings themselves will be looked to by the court, in order to determine their character.

In this case defendant has set up pleas putting at issue the unconditional character of the instrument sued on, by endeavoring to subject it to the terms of a private agreement; and the parol proof to do so, it is contended, tends to change, alter and vary the same.

This is undoubtedly true, and is in violation of one of the plainest principles of the law of evidence.

The plea set up tends to subject the unconditional obligation sued on to certain credits claimed by defendant for services rendered plaintiffs as their agent, and arising from other business transactions between them, *ergo* the plea is one of compensation.

The law is well settled, that an unliquidated claim cannot be pleaded in compensation against a liquidated demand, and for the obvious reason that the proof required in both cases is not of equal dignity.

Rehearing refused.

No. 199.

IN THE MATTER OF THE INTERDICTION OF GEORGE W. RANDOLPH.

1. A person against whom proceedings for interdiction have failed, cannot be held for the fees of surgeons appointed or experts to examine into and report upon his mental condition.
2. It does not affect the case to the detriment of the defendant in the interdiction proceeding, in the matter of his liability for the expert fees, that the commission of surgeons was appointed by the court on defendant's own motion or suggestion.
3. The Act of 1880, commonly designated as the Stamp Act, does not abrogate C. P. Arts. 549 and 552, and hence has no application in this controversy.

Appeal from the Civil District Court. Houston, J.

G. A. Breaux & Hall for plaintiffs in rule.

Miller & Finney for defendants, appellants.

ROGERS, J.—Proceedings for the interdiction of Geo. W. Randolph were instituted. In the course of the investigation it was suggested to the court, on motion of the defendant, by counsel, that a commission of three surgeons and physicians should be appointed to enquire into, examine and report upon the mental condition of the defendant. These surgeons were thereupon appointed by the court, and acted in accordance with the order of court. The trial of the cause resulted in a judgment in favor of defendant and dismissing the proceedings. The three physicians then applied to the court to have the fees for their services fixed and taxed as costs, and that defendant be ordered to pay such taxed fees. The Judge *a quo* so ordered, and Randolph has appealed.

Art. 397, C. C., provides: "On every petition for interdiction the costs shall be paid out of the estate of the defendant, if he should be interdicted, and by the petitioner, if the interdiction prayed for should not be pronounced." It is difficult to see how any misapprehension can arise upon the application of terms so clear and explicit.

It was perfectly proper for defendant, as a means of defense, to suggest to the court either the propriety or the necessity for a medical expert commission, and the fact that he so moved the court, did not in any manner impair what the provisions of the law had declared as the result of the suit for his interdiction. The court was at liberty, in the exercise of a sound discretion, to determine whether it was necessary or not to appoint the commission suggested, and the action of the court was not the action of the mover, for which he could be held as a contractor for services, but the judicial act of the Judge.

The term "expert" is used in this matter by both appellants and appellees, and we do not consider it necessary to determine here whether the term is correct or not; but assuming it to be correct, and that the Act of 1880, referring to costs of court, and requiring stamps to be affixed to all papers filed, would require even such advances as contemplated by the Act, for costs to be

made by a defendant in an interdiction suit, before a Judge, we do not see the application to the present issue.

Arts. 549 and 552, C. P., directly apply to such matters as those in the present record, and in nowise warrant the inference that they have been suspended by the Act of 1880.

The judgment is reversed, in so far as it orders the payment of expert fees due to Doctors Beard, Scott and Smyth, to be paid by the defendant, Geo. W. Randolph, and in so far as it fixes the amount and orders the same to be taxed as costs, it is affirmed, appellees paying costs of appeal

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No. 181.

M. A. BAKER *v.* STOUTMEYER & Co.

1. Litigants may, by implication as well as by expression, waive particular issues in a cause.
2. Where a plaintiff expressly alleges that the defendant firm is commercial, and that its members are bound *solidarily*, and the answer has no express denial of this fact; where, also, the judgment below was in accordance with the allegation, and the defendants moving in the court *a quo* for a new trial make no complaint upon this score, and where, in argument before this Court, oral and printed, no objection is made to this feature of the judgment; held, that the issue will be considered waived, and this Court will not consider it upon application for a rehearing.
3. Upon questions of fact, this Court will not lightly disturb the finding of the Judge *a quo*.
4. There is nothing in the contract of mandate which makes it *essentially* gratuitous.
5. There is nothing in La. Civil Code, Art. 2991, which requires that the agreement which shall render a contract of agency not gratuitous shall be *express*.
6. Such an agreement, therefore, may be *implied* from the circumstances of the case, from actions, and even from the silence or inaction of parties.
7. When, therefore, one party performs for another, services for which it is the universal custom to charge and receive compensation at rates fixed by usage, an agreement for such compensation, in default of expression to the contrary, will be implied.

Appeal from the Civil District Court. Tissot, J.

Jas. B Guthrie for plaintiff.

J. R. Beckwith for defendants, appellants.

ROGERS, J.—A careful examination of the facts in this case, does not convince us that the Judge *a quo* erred.

His review of the law, in a very able opinion which he read on deciding the case, is, in our opinion, correct, and we adopt his reasons for judgment.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

MCGLOIN, J.—We are asked in this case to grant a rehearing:

1. Because the facts, as defendants contend, show that plaintiff, if employed by any one, was so employed by E. A. Burke and others, who figured as purchasers of the Times newspaper, and not by them (defendants) who were vendors.

2. That this Court, as well as the court *a quo*, erred in holding that there was in this case an implied agreement for compensation, inasmuch as plaintiff declares that there was no express understanding to that effect, and defendant Stoutmeyer particularly swears that he never contemplated paying plaintiff anything, and that, as an understanding to pay, either express or implied, is essential in order to render the mandate not gratuitous, the mandate in this case, if any existed, must, under the Code, have been gratuitous.

3. That the defendant firm was engaged in publishing a newspaper, and hence was not commercial; that, nevertheless, the members thereof have been condemned *in solido*.

We will first consider and dispose of the last presented issue, as, of those involving questions of law, it is the more easily disposed of. We ascertain, from the record and history of this cause, as the same appears before and is known to us, that, although there was an express allegation of the commercial character of this firm, and of the consequent liability of its members *in solido*, the answer has no express denial of this fact; that the judgment below was in accordance with the prayer of the petition, and defendants when cast moved for a new trial, and the motion contained not a single complaint of the solidary character of the judgment; that upon appeal, counsel for defendants presented briefs and

made elaborate oral argument, saying, neither in print or by word of mouth one word against this feature of the decree appealed from. Now, however, that the judgment of the lower court has been affirmed, for the first time, so far as we can perceive, the appellants ask us to set aside the decree we have rendered upon this point.

We are not disposed to do this under such circumstances. Parties may certainly by expression waive particular issues in any cause, and what may be done by expression, may be equally done by implication, this latter arising from circumstances which are clear and unmistakable. It has often been held that bills of exception not particularly brought to the attention of the Appellate Court will be considered as waived, and we see no reason why the same rule should not cover objections to particular and distinct findings in the judgment itself, or findings which, as it were, determine collateral and incidental issues turning upon questions of law and fact that are to some extent aside from the main controversy of indebtedness *vel non*.

We do not hold that an express denial was essential to put this question at issue, nor that the omission to complain of this feature of the judgment in the rule for new trial filed below was, of itself, fatal, nor that, even in face of these facts, had the question been suggested to us in brief or argument before adjudication, we might not have determined it. These particular incidents are mentioned as circumstances going to aid in establishing the waiver by implication. We do, however, declare that where, upon an issue such as this, the appellant makes no suggestion of any kind to this Court, of error, before there has been an adjudication, that we will consider the issue waived. We say also, that it would not be in accordance with the principles of justice and fair dealing to permit an appellant, either intentionally or unintentionally, to hold his peace when he should have spoken, and permit the Court to affirm an incidental or collateral finding, against which no suggestion of complaint is made, and then seek to impose upon an appellee the delay and labor of a second

trial, merely for the purpose of determining upon that particular issue.

With regard to the question of employment, as to whether plaintiff was engaged for the defendants, or for E. A. Burke, the purchaser; this is a question principally of fact, and the Judge *a quo* has found for the plaintiff, and we have not been led to believe that there is clearly an error in such finding. We therefore, have left it undisturbed. Dreyfus vs. Lincoln, 1 McGloin, 313.

With regard to the remaining point, we are unable to bring ourselves to accept the propositions stated by the defendants.

There is nothing in the contract of mandate which makes it *essentially* gratuitous. All that our Civil Code says (Art. 2991) is that, " the procuration is gratuitous unless there has been a contrary agreement."

Now, even if we concede that " *procuration*," as the term is here employed, is synonymous with the word " mandate," as the latter is used in its broadest sense, and as including all manners of agency; yet there is nothing in this Article which required an *express* agreement, in order to take a contract of agency from under its operation.

The Code of Louisiana (Art. 1779) gives the four requisites for the formation of a valid agreement. Of these, " consent lawfully given " is one. This consent is a meeting of minds brought about by a proposition, and the acceptance thereof. C. C. Art. 1798. But, both the proposition and the assent may *be implied*. C. C. Art. 1811. And, both are *implied* when " manifested by action, *even by silence or inaction*, in cases in which they *can, from circumstances, be supposed to mean*, or by legal presumption are directed to be considered as evidence of assent." C. C. Art. 1811.

It follows from this that, in case of mandate, the agreement to compensate the one who serves may be *implied*, either from the actions, or even the silence, or inaction of the employer.

Now, the necessary result of the Articles of the Code applicable, and particularly of Article 1811, is that each party *has the right to infer* (or *suppose*, as Article 1811 puts it) the consent of the other, if, under surrounding circumstances, either the acts,

or the silence or inaction of such other are such as to fairly justify such an inference; and to justify the contention of the defendant, that they, Stoutmeyer & Co., had in this case only to reserve within their own minds the unexpressed determination to pay nothing for plaintiff's services, in order to defeat, under any circumstances, a legal agreement, is practically to nullify Article 1811 of Civil Code. It is practically to declare that *mental reservations* may, in the outcome, belie the *actions* of the parties holding them; that parties may be deceived to their detriment, by being led to infer acquiescence, where such acquiescence is fairly inferrable, and to act accordingly, only to be made in the end the suffering victims of deception. It is to obliterate the equitable doctrine of estoppel, which, in our law, as to the assent to contracts, has the express sanction of this Article 1811 of the Code, and is made as well as if it were a principle of the express law.

In this case, according to the facts as lawfully found, Stoutmeyer & Co. had a valuable property which they were and had been anxious to dispose of. The plaintiff, without any bond between him and the defendant that would justify the inference by the latter that he would labor for love alone, undertook, with the knowledge and participation of the latter, the finding of a purchaser and the bringing about of a sale. Both of these things he did, after a long delay and with considerable labor. In so doing he performed the service of a broker; acting, therefore, as one of a class of mandatories *who are universally paid*, and at rates *fixed by usage*, for such services. Surely, Stoutmeyer & Co. had no reasonable ground for supposing that plaintiff would act for them as a broker, and at the same time be what no other broker would have been towards them, a "laborer without hire!" If Stoutmeyer & Co. expected plaintiff to hold towards them such an exceptional position, it was their duty to say so; and having failed to do this, they are to be held as tacitly consenting that plaintiff should be towards them as other brokers, and receive payment for his services.

Rehearing refused.

BELLOCQ & OSTHEIMER *v.* A. C. ALLEN, Administrator.

1. The fact that counsel for a party was not aware that the case had been set for trial, will not entitle such party to relief from the effects of a surprise and an *ex parte* trial, unless it be shown that the counsel could not, by the exertion of reasonable diligence, have ascertained the condition of the case and been present at the trial.
2. In the absence of the evidence or a statement of facts, it will be presumed that sufficient evidence was offered below.
3. Under the reconventional demand for damages, in an injunction suit, the defendant may insist upon the trial of the case, and demand his interest and damages, notwithstanding the absence of the plaintiff.

Appeal from the Nineteenth Judicial District Court, Parish of St. Mary. Goode, J.

A. L. Tucker for appellants.

A. C. Allen for appellee.

SMITH, J.—Bellocq & Ostheimer, defendants in suit No. 7450, entitled, A. C. Allen, Administrator, vs. Bellocq & Ostheimer, have instituted this suit to annul the judgment rendered therein, for the reasons set forth in their petition, which is properly in the character of an answer, and constitutes the basis of the defense which could have been urged in said suit No. 7450.

The burden of their complaint is, that the case was taken up and tried in the absence of defendants and their counsel, and that they became aware of this fact too late to avail themselves of their right to move for a new trial; hence, this resort to their action of nullity, based upon the nullity of the proceedings.

In order to suspend the execution of the judgment in suit No. 7450, pending their action of nullity, they sued out and obtained an injunction directed against the plaintiff and the sheriff.

To this action the defendant joined issue by pleading a general denial, coupled with a special prayer that plaintiffs' action be rejected and dismissed, and that the writ of injunction be dissolved, with 20 % damages on the amount of the judgment enjoined, and one hundred and fifty dollars damages as attorney's fees, to be recovered by judgment to be rendered *in solido* against plaintiffs in injunction and the surety on their injunction bond.

It appears that the evidence on the trial below was not reduced to writing, and we have no opportunity of reviewing the same. The judgment rendered by the lower court relates that the case had been regularly fixed for trial, that the plaintiffs had been called and failed to appear and prosecute their suit, that the defendant had proved up his case and demand for damages, and considering the law and the evidence being in favor of the defendant and against the plaintiffs, proceeded to render judgment rejecting plaintiffs' demand and dissolving their injunction, with 20 per cent. damages on the amount enjoined and fifty dollars special damages as attorney's fees, to be recovered as prayed for in defendants' answer.

In the absence of evidence and any statement of facts in the record, we will presume that the judgment was rendered on proper evidence submitted before the Judge *a quo*. See 30 La. An. 628; 24 La. An. 20; 23 La. An. 504.

It is persistently urged that the judgment is illegal and irregular, owing to the fact that under the pleadings the defendant was entitled to a judgment of non-suit only, and that the judgment in damages was unauthorized by law.

It has been held that the fact counsel of a party was not aware that the case had been set for trial, will not entitle the party to relief from the effects of a surprise and an *ex parte* trial, unless it be shown that the counsel could not, by the exertion of reasonable diligence, have ascertained the condition of the case, and been present at the trial. 2 La. An. 955; 10 La. An. 193; 4 La. An. 240.

It is not pretended to account for the absence of plaintiffs' counsel in any of the modes provided by law. Counsel are always presumed to be in court, as well as suitors, and are presumed to be aware of the sittings of the courts established by law.

It is furthermore urged that the judgment should have been, on the failure of plaintiffs to appear, simply that of non-suit, and that the claim for damages was not triable.

The fact is that the case was regularly fixed for trial, and what

is termed a reconventional demand was tried simultaneously with the main action. The former, for want of appearance, was dismissed and rejected, they having failed to appear and prosecute their suit; the issue set up by the defendant was also tried, and resulted in a judgment.

This mode of proceeding is authorized by Art. 304 of the Code of Practice, which provides, on the dissolution of an injunction, that the court shall, in the same judgment, condemn the plaintiff and his sureties in damages.

In 28 La. An. 815, it was held, that under the reconventional demand for damages, the defendant might have insisted upon the trial of the case, notwithstanding the absence of the plaintiff.

In 5 La. An. 298, it was held, that the defendant had a right to claim interest and damages on the trial of a motion to dissolve an injunction, and that the plaintiff could not deprive him either of the trial of the rule, or such interest and damages, by failing to appear and prosecute his suit. 11 La. An. 287, 302; 5 La. An. 402; 5 Martin La. N. S. 120.

Judgment affirmed.

No. 231.

H. LEONIE PICHOT *v.* RECORDER OF MORTGAGES.

1. Under Art. 176, Const. of 1879, no mortgage or privilege upon immovable property (not specially excepted therein) can affect third persons, unless recorded or registered in the parish where the property is situated, and as provided by law.
2. This Article of the Constitution brings within the scope of its principal clause both *tax mortgages* and *tax privileges*, but among the exceptions it enumerates only *tax privileges*, and not tax mortgages.
3. Therefore, *tax mortgages* are not excepted from the absolute necessity of registration, in order to bind third parties, and they do not so bind unless thus recorded.
4. Art. 176, by its language, fixes upon the registration laws *then in operation*, and permits only such mortgages and privileges (not for taxes) as have been registered in accordance with the then existing laws to affect immovables to the prejudice of third persons.
5. Where an inscription in the mortgage office mentions simply the *tax mortgage*, it will not be recognized as preserving or concerning in any manner the *tax privilege*.

6. Under the general laws existing in 1879, a mortgage, tax or other, perempts within ten years from the date of the first inscription, if it be not re-inscribed.
7. It is made by law the ministerial duty of the Recorders of Mortgages to erase from the books of their respective offices all perempted mortgages.
8. Being such a merely ministerial duty, the Recorder of Mortgages may be proceeded against by mandamus to erase perempted tax mortgages, even where the State is concerned.
9. The mortgage is simply an accessory right. It may fall, without carrying with it the principal obligation.
10. The lapsing of a mortgage for failure to re-inscribe does not present, strictly speaking, a question of *prescription*.

Appeal from the Civil District Court. Tissot, J.

A. J. & Omer Villeré for relator.

John McEnery and *J. C. Egan* for respondent, appellant.

McGLOIN, J.—Relator has sued out a writ of mandamus to compel the Recorder of Mortgages for this Parish to erase from his books an inscription for taxes of 1871. The State of Louisiana, being made party, has appeared and contested for and with the Recorder. The tax in question was registered January 4th, 1873; and this suit was brought March 21st, 1883, so that more than ten years had, at the date of bringing suit, elapsed since the recordation of said tax.

The relator contends that the tax in question is prescribed by ten years, and that it is the ministerial duty of the Recorder to cancel the inscription.

Counsel for the State of Louisiana contends that a tax is not a debt, but a forced contribution; that the laws of prescription affectin simple debts cannot be extended so as to affect such forced contributions.

He also contends that, the State being the sovereign, prescription cannot and does not run against it, unless there be some express provision of the law which brings the State into the category of those who can lose by prescription.

It seems to us that neither of these questions are necessarily involved in this case. Art. 176 of the Constitution of this State, adopted in 1879, declares that "no mortgage or privilege on im-

movable property shall affect third persons, unless recorded or registered in the parish where the property is situated, in the manner and within the time *as now prescribed by law*, except privileges for expenses of last illness, and privileges for taxes, State, parish or municipal; provided such privilege shall lapse in three years."

This Article, if applicable to taxes accrued before 1879, brings clearly within the scope of its principal provision both tax *privileges* and tax *mortgages;* but among its exceptions it includes not tax *mortgages*, but *tax privileges* alone. It is, therefore, the tax *privilege* alone which can, in any case, bear to the detriment of third persons upon immovable property; and this only during three years. The tax *mortgage*, whether State, parish or municipal, is placed peremptorily and permanently under the dominion of the general laws as existing at the date of the adoption of said Constitution. Now, under the Civil Code, then as now existing and in force, there were provisions enforcing the recordation of mortgages, in order to preserve their force and effect against third persons.

Civil Code, Art. 3342, is as follows: "Conventional mortgage is acquired only by consent of parties, and judicial and legal mortgages only by the effect of a judgment or by operation of law.

"But these mortgages are only allowed to prejudice third persons when they have been publicly inscribed on the records kept for that purpose."

And Article 3345 is as follows:

"All mortgages, whether conventional, legal or judicial, are required to be recorded in the manner hereafter required."

Among other Articles regulating such recordations we find:

Art. 3347. "No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated."

And further on, after fully regulating the manner of inscribing, the Civil Code has, in Art. 3369, the following:

"The registry preserves the evidence of mortgages and privi-

leges during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made," etc.

Now, the particular inscription complained of in this case, as shown by the certificate before us, is as follows: B. 98, fo. 112; one mortgage, State taxes 1871, Rec'd January 4th, 1873, $473. It will be seen, therefore, that the inscription preserves only the *mortgage*, no mention being made of any privilege; and accepting the reasoning in the case of State ex rel. Mrs. Jackson vs. Recorder of Mortgages, 34 La. An. 178, we find that the two are entirely distinct. As preservation of a mortgage, the inscription, as we have shown, is subject to the general laws and, hence, to Article 3369, Civil Code, and it became nugatory after ten years.

Furthermore, the clauses which add the rights of mortgage to those of the mere privilege, in the case of taxes, do not go into the slightest detail, and hence, we may presume that it is the mortgage already before known to the law, and as created and regulated in the Civil Code and Statutes of the State, which was in contemplation. Therefore, even if Article 176, Constitution of 1879, be not applicable, Article 3369 of the Civil Code should govern.

We have not in any manner touched upon the question of prescription as against the State. The lapsing of a mortgage for failure to reinscribe, is not, strictly speaking, a matter or question of prescription. The mortgage is not necessarily a part of the debt; it is only an accessory right. The personal obligation may stand, though the mortgage perish. The plaintiff in this case is a third person, and it does not result at all from our decision that the State has no further recourse against the original debtor. In other words, we are not called upon to decree prescription against this debt or forced contribution, whatever it may be. We simply hold, that to maintain the necessary right of mortgage, certain formalities were necessary, and that these not having been complied with, the accessory right is perempted.

Ten years or more have elapsed, as relator contends, since the

recordation of the tax in question, and before the filing of this suit, under Revised Statutes, Section 3141, it was the ministerial duty of the recorder of mortgages to erase. The conclusions arrived at in this case are in accord with those expressed by us in the case of Musson de Rochefort vs. Recorder of Mortgages, reported in 1 McGloin; for, in that case, we held that the Section 3141, of the Revised Statutes, was applicable only where more than ten years had elapsed from the date of the latest inscription. The case, as now presented, comes clearly within the purview of the Sections of the Revised Statutes in question.

Judgment affirmed.

MOSES LOBE & CO. *v.* MARGUERITTE BODIN, Wife, Etc.

1. A wife cannot be held in her individual property for the debts of her husband, or for those of the community, which have not enured to her separate benefit.
2. Where, however, there has been made to the wife, by the husband, a *dation en paiement* of certain goods in a store, and the wife becoming separate in property, has taken charge of the store and business, and where a creditor of the husband, having in the stock so transferred, merchandise, which had not been paid for, and upon which such creditor claimed a privilege; and where such creditor, being about to seize the said merchandise, the wife to prevent such seizure and quiet her possession and title, compromises with the creditor and agrees to pay part of the debt; held, that the sum thus agreed upon becomes her individual debt, and she is and remains liable therefor.

Appeal from the Twenty-first Judicial District Court, Parish of St. Martin. Fontelieu, J.

A. & R. DeBlanc for plaintiffs, appellants.

Mouton & Martin for defendants.

MOORE, J.—This is a suit by the plaintiffs, merchants doing business in the City of New Orleans, against the defendant, a married woman, separated in property from her husband, and doing business in the town of St. Martinsville, as a public merchant, to recover from her the sum of $600.00, with interest, etc. The suit is based on a written confession of judgment by the defendant. The plaintiffs in their petition, allege in substance, that to avoid a lawsuit and

to adjust the differences that existed between them and defendant, they entered into a transaction with her by which she bound herself to pay them said sum, and that she has failed to pay the same.

The defendant resisted the payment of said sum in an answer to plaintiffs' petition, wherein she alleges in substance that since her separation in property from her husband, she, under an erroneous belief and misapprehension of the facts, consented to grant a judgment against herself in favor of plaintiffs, and opposes the confirmation of said confession of judgment, on the following grounds:

1. Because she cannot be made responsible for her husband's debts, nor is she allowed by law to consent thereto.

2. Because said debt is essentially a debt of her husband.

3. Because neither the debt nor the confession of judgment, above mentioned, was of benefit to her or to her estate.

There was a judgment for defendant, dismissing and rejecting plaintiffs' demand at their costs. The plaintiffs have appealed.

It appears by the evidence and the record that the defendant's husband was formerly a merchant doing business in the town of St. Martinsville; that late in the year 1881 he purchased a lot of merchandise from plaintiffs for the sum, in the aggregate, of $952.62, for which he became indebted to them, and which was to be paid at a later day.

The goods so purchased were delivered to her said husband and received by him at his store aforesaid. On the first day of February, 1882, defendant's husband made a *dation en paiement* to his wife, to reimburse her certain amounts of money, her separate and paraphernal property, which he admits therein that he had received and expended for his own use and benefit; in this *dation en paiement* is included all the goods and merchandise, which were at the time in his store. Subsequently, viz.: on the 8th day of February, 1882, defendant obtained a judgment of separation of property from her husband, and for a sum of money, subject to the credit of the amount of the *dation en paie-*

ment aforesaid. The husband filed his answer in the suit for separation, acknowledging his indebtedness to his wife, as alleged by her in her petition, and submitting to the decree that might be rendered.

It is shown by the evidence that the defendant continued the business of a merchant in the same store where her husband had carried it on, and that part of her stock when this suit was begun consisted of the very goods which plaintiffs had sold to her husband, and for which he had not yet paid them. That when plaintiffs heard of the *dation en paiement*, they sent one of their employees or clerks to St. Martinsville, with instructions to cause suit to be instituted for the attachment or sequestration of the goods then in defendant's store, which they had sold to her husband, as aforesaid, and to enforce against said goods their rights and privilege of vendors. The messenger of plaintiffs, on his arrival at St. Martinsville, employed an attorney-at-law for the purpose of having said proceedings begun and carried out. The proceedings were filed and the order from the clerk of court obtained; but before proceeding to have the writ executed, at an interview between plaintiffs' attorney, defendant and her attorney, a compromise or amicable settlement of the differences existing between them was effected. By this compromise the defendant obligated herself to pay plaintiffs the amount of money sued for. She accepted service of the petition in this suit, waived citation, admitted that the transaction, compromise or settlement between her and plaintiffs was such as it was alleged to be by plaintiffs in their petition, and confesses judgment in their favor for the amount claimed. The defendant was properly authorized in these proceedings.

It is well settled, as contended for by defendant's attorney, and cannot for a moment be gainsaid, that a wife cannot bind herself for her husband's debts or for those of the community, and that the law on this subject is prohibitory. But does that law apply in the case before us? Are the plaintiffs in this case seeking to enforce against the wife an obligation into which she has entered with them to pay the debt due by her husband? If they are,

then the judgment of the lower court ought not to be disturbed. We cannot, after having closely examined the evidence adduced on the trial of this case, assent to the proposition of defendant's attorney, that her obligation is violative of the law upon which she relies in her defense; that it is an obligation to pay a debt due by her husband.

The agreement into which she entered with plaintiffs was a new contract, distinct and separate from that of her husband, by which he had become indebted to them in a larger sum. The consideration of this new contract was not the payment of her husband's preëxisting debt; but it was, that the goods which were then in her store, and under her control and in her possession as a merchant, to be sold in the course of her business for her sole use and benefit, at a profit if possible, should remain securely hers, free from the superior claim upon them set up by the plaintiffs, the only persons who could pretend to any claim whatever upon them superior to hers.

The act done by her was a voluntary one. She was not, nor does she pretend that she so was, induced by fraud, or any undue influence, to make the agreement declared on. She was not led into error by the misrepresentations of either the plaintiffs, or any other persons, in regard to any fact connected with the case, nor does she allege anything of that kind in her defence.

She entered into the agreement declared on and confessed judgment in favor of plaintiffs, in order that her title to the goods and merchandise which she had obtained from her husband should be quieted and put at rest. She bought from plaintiffs, for six hundred dollars, all their rights and privileges, whatever they might have been, upon the goods aforesaid, and obligated herself to pay them that amount. This she did, by way of a compromise with them of the difficulties then impending between them and herself, and then acquired quiet, undisputed and indisputable title to and possession of the property in question.

If ever a wife entered into an obligation or contract that enured to her separate use and benefit, the defendant did so in this case. To allow her to retain the goods and merchandise in ques-

tion, without paying the plaintiffs the money which she has obligated herself to pay, would be to enable and to assist her to enrich herself at the expense of the plaintiffs; and this would be repugnant to the law, to justice and equity. In the case of Jordan & Co. vs. Anderson, 29 La. An. 751, the Court uses this language: "We know of no law, however, and have been referred to none, which exonerates the wife from the obligation to pay for what enures to her separate benefit, or that of her separate property." In Sewell and husband vs. Cox, 10 Robinson La. 72-3. the Court uses the language: "It is well settled that when it is shown that the consideration of the obligation of a married woman, contracted conjointly with her husband, was received to her own use and benefit and has turned to her advantage, and was not a thing which the husband was bound to furnish her with, she is liable and must comply with her contracts; (see also cases referred to in this opinion, 7 Martin La. 488; 7 Martin La. New Series, 64; 10 La. 147) for then she cannot be considered as having bound herself as security for her husband, nor as obliging herself conjointly with him for a debt in which he is alone concerned. Yet it may be true that the debt that was extinguished with the defendant's money was originally contracted by the said plaintiff's husband, but it bore upon the property purchased by the wife; said property was liable to be seized and sold in satisfaction thereof, (as the property was in the case at bar) and her situation was not in any manner made worse by the loan obtained from defendant; on the contrary, *it was bettered, as it gave her a clear title to the property*, and as we found in Twichell vs. Andry, (6 Rob. La. 407) the consideration for which she assumed to pay the debt sued on may be fairly considered as part of the price of property by her acquired at the sheriff's sale. It follows, therefore, that the debt was contracted by the appellant for her private benefit."

In this latter case, from which we quote, a suit was brought on a note for $600.00, with mortgage on certain slaves, separate property of the wife, executed by the husband and wife, the plaintiffs, for money borrowed by the husband from defendant for the pur-

pose of paying a mortgage debt due by him to a minor, his ward, which mortgage bore upon certain property of the husband which the wife had purchased at a sheriff's sale in satisfaction of her claim and judgment against her husband. The holder of the mortgage and note sued out an order of seizure and sale on the note and act, the execution of which was enjoined by the wife on the ground that she could not be held responsible on a note and mortgage given to pay the debt of her husband. The judgment in the case was against the wife. See also 10 Rob. La. 71-2-3; 6 Rob. La. 410; 29 La. An. 751.

Judgment reversed.

No. 232.

A. E. MASSMAN BROS. *v.* FRANZ WITTUM.

1. Where a plaintiff propounds to defendant, interrogatories upon facts and articles, and defendant answers to the merits, but fails to respond to the interrogatories, and plaintiff, after the legal delays, takes such interrogatories *pro confessis*; held, that judgment upon merits is not confessed.
2. The use or purpose of interrogatories upon facts and articles, under the law, is simply to furnish or secure evidence for the day of trial, either contested or upon confirmation of default.
3. A judgment rendered, as if confessed, in a cause wherein the issue has been joined, upon the failure, simply, of defendant to respond to interrogatories upon facts and articles, will be reversed, and the cause remanded.

Appeal from the Civil District Court. Monroe, J.

J. P. Hornor and *F. W. Baker* for plaintiffs.

Braughn, Buck & Dinkelspiel for defendant, appellant.

ROGERS, J.—Plaintiffs, holders of a promissory note, brought suit, to which defendant, within the legal delays, filed a general denial. Plaintiffs annexed to their petition certain interrogatories on facts and articles, and defendant failing to answer, the

interrogatories were taken as confessed. Thereupon, before the trial on the merits, after issue joined, plaintiffs moved the court for judgment, as confessed, basing the motion upon failure of defendant to answer interrogatories on facts and articles.

Art. 347, C. P., authorizes plaintiff and defendant to annex either to their petition or answer such interrogatories. Art. 348, C. P., distinctly defines that interrogatories on facts and articles are questions put in writing, in the form of articles, and annexed to a petition or to an answer, to which one of the parties to the suit prays that the other be ordered to respond under oath, in order to make use of his answers *as testimony, in support of his demand, or to aid him in his defense.* Art. 354, C. P., declares the answers of the party interrogated are evidence.

Plaintiffs insist that the failure to answer and the judgment ordering the interrogatories be taken for confessed, should be considered a judicial confession, as defined by Article 2291, C. C., which says: "The judicial confession is a declaration which the party, or his special attorney in fact makes in a judicial proceeding." This means essentially a voluntary and an expressed act, which amounts to full proof, and cannot be revoked. The propounding of interrogatories is permitted in aid of the cause of a plaintiff or a defendant, by express provisions of the Code, which sets out the uses and purposes, viz: to be used as testimony to support a claim or aid a defense. The law extends no greater privilege by this form of proceeding than this.

The District Court held the views presented by plaintiffs and granted a judgment in their favor. This, in our opinion, was erroneous. The judgment is, therefore, set aside, and the case remanded to the lower court for further proceedings, according to law, appellee paying costs of this Court, the costs of the District Court to abide the final judgment on the merits.

No. 176.

WM. G. HENRY *v.* PAUL TRICOU—S. D. MOODY, Third Opponent.

1. In a sale of machinery, or other articles of great weight, manual delivery is not contemplated or possible, and hence, is not in law required.
2. Where property is in the possession of a joint owner, and his co-owner has alienated, the acceptance or recognition, by the co-owner in possession, of the title of the acquirer, completes delivery.
3. La. C. C. Art. 468, making immovable by destination things placed by the owner upon a tract of land, for its service or improvement, and also movables which may be similarly attached to the tenement or building, applies only when the improvements, etc., are thus added or attached by the *owner*, and not when it is merely a tenant who does it.
4. Where a tenant has made such additions to the soil or building, the owner has only the right, as to such improvements, etc., of compelling him who put them up, or on, to remove, or to retain them as his own, upon paying to the tenant, costs of materials and workmanship.
5. In such a case, until the owner elects to retain, the improvements, etc., remain the property of him who put them up, or on, such ownership, however, remaining subject to the right of the owner of the realty, as given by law.
6. The conferring, therefore, by destination, of the character of an immovable upon improvements placed by a tenant upon realty belonging to the lessee, depends solely upon the volition of the lessor.
7. Nor does this change in character take place until the lessor has exercised his choice under the law.

Appeal from the Civil District Court. Tissot, J.

T. M. Gill for plaintiff and appellant.

J. B. Guthrie for third opponent.

ROGERS, J.—The plaintiff having obtained a judgment against the defendant Tricou, with privilege on certain engines and machinery located in buildings 178, 180 and 182 South Peters street, caused to be seized under a writ of *fieri facias* said engines and machinery.

S. D. Moody, claiming to be the owner of one undivided half of the property seized, enjoined the sale. There was judgment in his favor, and plaintiff appealed.

The testimony adduced, in our opinion, has involved enquiry into matters that can have no force in determining this controversy.

There is and has been no dispute that the ownership of the one undivided half now claimed by Moody was originally in Ferguson, and he is in this record acknowledging and confirming the ownership in Moody, and thereby ratifying the sale made by Guthrie; there is no judgment against Ferguson, nor are his rights attacked in any way. It matters little, therefore, what were the terms and the relations of the transaction between Ferguson and Guthrie as to the disposition of the machinery and engines, by which, with Ferguson's approbation, Guthrie was enabled to make a sale and delivery to Moody. We are not able to discover from the record what avail it would be to plaintiff to have us decree that there was no sale, either to Guthrie by Ferguson or by Guthrie to Moody, for there is no shadow of right shown in favor of plaintiff to seize and sell the property, even of Ferguson, for a claim against Tricou. If anyone has the right to complain about a divestiture of title, that person is Ferguson, and he, on the contrary, is in court recognizing a final ownership in Moody.

However, as counsel for plaintiff has laid much stress in argument on the question of a delivery of the property sold by Guthrie to Moody, we will state, that from the very nature of the articles sold, heavy engines, machinery and appliances, it was evident that the delivery from hand to hand could not be made; nor was it advisable, nor was it to be expected that the machinery should be taken apart and divided out, piece by piece—the one-half given to Moody and the other half to Tricou; nor was there a necessity for this. La. C. C. 2478. Tricou was in possession of this property as joint owner, and a formal acceptance by him of the vendee's title and a recognition of the latter as a joint owner with him, of the property which he had held formerly in joint ownership with the vendor, is, as a matter of fact, a delivery, when the acts of the parties are not fraudulent; and a joint responsibility assumed and possession once acquired by the vendee, the law will presume the intention to possess sufficient to preserve possession. La. C. C. 3442. And, more than this, it is shown that Ferguson, whom, we have already said, was at one time the un-

disputed owner, leased the property from Moody, as the owner thereof.

We are considering the property seized as movable, and conclude the delivery sufficient as to property of that character.

Plaintiff, however, contends that the engines and machinery having been attached to real estate permanently, have become immovable by destination, and that, therefore, the sale should have been recorded to affect third parties.

Article 468, Louisiana Civil Code, provides that "things which the *owner* of a tract of land has placed upon it for its service and improvement, * * * and are such movables as the *owner* has attached permanently to the tenement or building, are immovable by destination."

And to the same effect is Louisiana Civil Code, Article 469, referring to movables affixed to a building with plaster or mortar, or such as cannot be taken off without breaking or injuring the part of the building to which they are attached." Theurer vs. Nautre 23 La. An. 749.

In this case, however, the machinery and engines were constructed by Tricou & Ferguson, who *are not the owners*, simply tenants of the owners of the building.

In Baldwin vs. Union Insurance Co., 2 Rob. La. 136, these words were used:

"Under the Roman law, ('*De Acquirendo Rerum Dominio*,' *Lib. 41, Tit. 1, Sec. 12*), the doctrine of accession was carried so far, that the person who made constructions on a soil which he knew to belong to another, was presumed to be willing to lose his materials and had no claim whatever against the owner of the soil, who acquired an absolute right to whatever was erected on it. Our law, Civil Code, Article 500 (now Article 508, Revised Civil Code) has so far modified the effects of accession in such cases, as to give the owner of the soil only the alternative of having the buildings removed at the cost of the person who erected them, or of keeping them as his own on paying to the owner of the materials their value and the price of workmanship. Until this

election be made, the works, although subject to the right of acquisition given the *owner of the soil*, continue to belong to and are at the risk of the person who made them."

From this it is very plain that the character of an immovable given by destination to a movable, is an act of the owner of the soil; that this character cannot be given by a tenant without the consent of the owner, nor does the change occur in the property by destination until the owner shall have elected to keep the addition as his own under the provisions of Article 508, La. Civil Code.

We do not discuss the question whether or not plaintiff has a privilege for his work and materials furnished on that part of the property owned by Moody; if he has he must assert it, and if he can establish such right he will not lack the facilities, which the law affords for executing it, but he cannot, in a judgment against Tricou, proceed against and submit to his writ the property of a third person.

The judgment perpetuating the writ of injunction was, we think, correct, and it is therefore affirmed.

No. 212.

MOSES LOBE & CO. *v.* ABRAHAM REINACH & CO.

1. The province of a bill of exceptions is to preserve for the appellate court the facts and circumstances and the ruling of the court *a qua* upon some matter or question, not of record, and arising incidentally during the course of the trial.
2. The province of a statement of facts, on the other hand, is to present, after judgment below, and in absence of a reduction of the evidence to writing, all the facts established in the case.
3. The remedy, therefore, of one who desires to appeal from the final decree of the lower court upon questions of law alone, is to prepare, or secure a statement of facts, as directed by C. P. Arts. 601, 602, 603.
4. A bill of exceptions will not lie to the final judgment rendered in a cause.
5. This Court will not permit a bill of exceptions thus drawn to stand in lieu of a proper statement of facts.

Appeal from the Civil District Court, Division E. Lazarus, J.

E. Evariste Moise for plaintiffs, appellants.

W. S. Benedict for defendants.

McGLOIN, J.—This is a cause involving less than $500.00, and hence, coming before us upon questions of law alone. We are asked to review the judgment appealed from upon what is designated as a bill of exceptions, and which is as follows:

Be it remembered, that the above entitled and numbered cause having been submitted, the Court, after hearing evidence and argument of counsel on the 7th day of March, 1883, for judgment, and there being no contest between the parties upon any subject matter of the allegations of the pleadings; the question submitted for the Court's determination being confined to:

1. Whether, as matter of fact, the goods contracted for had been manufactured according to contract, and whether the defendant, as a matter of fact, was entitled to recover from plaintiffs $36.00 for enlarging 60 dozen pantaloons.

And, thereupon, the Court found as a fact:

1. That it was impossible to tell from the evidence what proportion of the pantaloons were not made according to the contract, and found as law that plaintiffs could not reject the whole lot because a part were not made according to contract, to which finding of the law plaintiffs reserved their bill.

2. That defendants had failed to prove the facts necessary to recover the $36.00.

And the Court further found that the pantaloons contracted for were, at the time of trial, in condition to be received by plaintiffs, though they were not all in that condition when they should have been delivered, and thereupon gave judgment ordering plaintiffs to receive the goods and pay the contract price, dismissing the demand of defendants for $36.00; the costs of th proceedings to be borne equally by plaintiffs and defendants.

To all of which, saving the dismissal of the demand for $36.00, plaintiffs, through their counsel, excepted, and after approbation

of opposite counsel of this bill, tenders the same to the Court for signature and approval.

(Signed) E. EVARISTE MOISE,
Attorney for Plaintiffs.

NOTE BY DEFENDANTS.

After judgment in a suit, a bill of exceptions cannot be reserved. Exceptions can only be had to the ruling of the Court during a trial. All the facts advanced, without exception or reservation, and the law applicable thereto, were submitted to the Court and judgment was based thereon.

(Addition by the Judge).

An exception may be reserved to the decision of the Court, the application of the law to the facts.

(Signed) HENRY L. LAZARUS,
Judge.

New Orleans, March 9th, 1883.

This is unmistakably a bill of exceptions to the final judgment in the cause. We are asked, in the event of our concluding that this is not a proper case for a bill of exceptions, to ignore the matter of the mere name given the paper filed, and consider it as in truth a statement of facts. We are not prepared to do this, because there is involved something more than a matter of nomenclature. The statement of facts, as known to our law, is prepared in a particular manner, and it has a particular office to perform. When, in an appropriate case, an appeal is to be taken, "the party intending to appeal, or his advocate, must require the adverse party or his advocate to draw up, jointly with him, a statement of facts proven in the cause, and this statement, thus drawn up and signed, either by their parties or their advocates, shall be annexed to the records, and a transcript of the same transmitted to the Supreme Court."

It is only when the adverse party refuses to thus join in making such statement, or where the party cannot agree, that the Judge

a quo is called upon to make the statement of facts from his recollection, or from notes.

These provisions give to the appellee the valuable right of participating in the framing of a statement of facts, and to avail himself properly of the privilege, it is clear that he must know that it is in reality a statement of facts that he is expected to deal with. To hand him merely what is considered a bill of exceptions, in the drawing up of which he had no part, and which for its force must depend in the first place upon the Judge's approval and signature, cannot be at all considered as extending to him the privileges of C. P. Art. 602.

The system of pleading, in force in this State, is the creature of express legislation. The province of the bill of exceptions and that of the statement of facts is each clearly and expressly defined. In such a case, the courts cannot obliterate the distinctions of the law-maker, and permit different forms of proceeding to be used indiscriminately. Code of Practice, Articles 481, 483, 487, 488, 489, 510, all of which relate to the bill of exceptions, declaring how and when they shall be taken, etc., form portions of Sections I and II of Chapter V, both of which Sections relate to the course of civil *trials*, Section III of the same chapter being devoted to "Judgments and Costs."

There is only one of the Articles given (Article 487) which, by any stretch, can be imagined to have application so as to justify the taking of the bill of exceptions in this case. That Article is as follows:

"If one of the parties call on the Court to express an opinion on a point of law *arising in the cause*, such opinion may be excepted to."

It is evident that this Article refers simply to incidental questions arising during the progress of a cause, as for instance in the admission or rejection of evidence, the granting or refusing of continuances, etc., questions which are not otherwise of record and which need the preparation of a bill to preserve them for

presentation to the appellate tribunal. If the scope of the Article were as appellant contends, the language would have been different, using the word *points* instead of *point*, and the term "*which have arisen*," instead of "*arising*."

This is made additionally clear by the fact that Article 490, which authorizes the Judge to render final judgment immediately, if he thinks proper so to do, follows those Articles which relate to bills of exception, as it does all others governing the course of the *trial*, clearly indicating that such rendition of judgment is a matter of subsequent occurrence.

Another consideration is, that at the same time that the law has thus clearly defined the province of the bill of exceptions, it has also defined that of the statement of facts, and the latter it is, within which the circumstances being considered, must place this case. Among provisions of the Code of Practice which govern proceedings *after the judgment below*, we find Articles 601, 602, 603, which provide for the taking of the testimony, in writing, where either party requires it, which testimony, when so written, shall stand for a statement of facts, and where the depositions have not been thus reduced to writing, direct the preparation of an agreed statement, or one which the Judge draws up where parties fail to agree. These provisions, by pointing out a particular form of remedy for a case such as this, exclude such a case, by implication, from all other forms of proceeding in this regard.

We must, therefore, refuse to consider the bill of exceptions in this cause, and regard the case as one in which there is in fact neither bill of exceptions, statement of facts or assignment of errors, and dismiss the appeal.

In so doing, we consider ourselves as supported by the following authorities: Bujac vs. Mayhew, 3 Martin La. 613; Fagot vs. David, 4 Martin La. 1; Moore vs. Bacon, 2 Martin La. N. S. 249; Ferguson vs. Bacon, 12 Martin La. 303; Goodwin vs. Heirs of Chenan, 3 Martin La. N. S. 409; McMicken vs. Fair, 6 Martin La. N. S. 515.

We have gone to some length in determining this issue, inasmuch as there has been much question among members of the bar, as to the manner of bringing up causes that are in the condition of the present one, and we wish to place the point at rest, so far as we can do so, and to do away with the doubt, at least, so far as the practice of this Court is concerned.

Appeal dismissed at appellants' cost.

No. 216.

URBAN THEURER *v.* WIDOW J. H. WERNER.

1. In a cause involving less than five hundred dollars, and coming to this Court upon the law alone, the only method of bringing up the facts is by statement of facts.
2. A bill of exceptions will not lie to the final judgment rendered by the court *a qua* in any cause. Moses Lobe & Co. vs A. Reinach & Co., *supra*, affirmed.

Appeal from the Civil District Court, Division E. Lazarus, J.

Chas. Louque for plaintiff.

S. Belden for defendant.

ROGERS, J.—The amount involved in this controversy is less than $500. There is nothing in the record which this Court can review. A bill of exception seems to have been taken by the appellant to the final judgment, rendered in the cause by the Court *a qua*. This raises the same question as was presented to us in the case of Moses Lobe & Co. vs. A. Reinach & Co., and it must be determined in the same manner.

It is true that that cause is pending before us on a rehearing, and has not been finally determined. There is in that cause the question presented as to whether or not the bill of exceptions therein is not of itself sufficient to stand as a statement of facts, an issue that cannot possibly be contended for in this case.

Appeal dismissed.

No. 218.

B. E. Fisher *v.* J. Ullman.

1. Where counsel have not agreed upon a statement of facts, and both sides have presented their versions of what the facts are; held, in such a case, the Judge *a quo* must determine what are really the facts, and certify accordingly.
2. Where, therefore, the Judge *a quo* in such a case, sends up the following certificate: "I have examined both the statements of fact, and I find in them nothing contradictory, I therefore sign them, although I have no recollection of the evidence, or of the grounds of my decision," this Court will not consider such a document as a lawful statement of facts.
3. Where counsel cannot agree, and the Judge *a quo* has no recollection, as in this case, there can be no proper and lawful statement of facts.
4. Where, in such a case, the appellant has made every effort, within a short period after the rendition of judgment, to secure his statement, and he is not in fault, the cause must be remanded.

Appeal from the Civil District Court, Division B. Houston, J.

W. S. Benedict and *B. McCloskey*, for plaintiff, appellant.

Braughn, Buck & Dinkelspiel, for defendant.

Rogers, J.—This case being under $500, comes before us on question of law.

The counsel for plaintiff proposed what they deemed a statement of facts, found on the trial, and defendant's counsel has also proposed a statement of facts containing their views. These statements were furnished the District Judge who says: "I have examined both the statements of fact, and I find in them nothing contradictory. I, therefore, sign them, although I have no recollection of the evidence or of the grounds of my decision."

When the parties do not agree upon a statement of facts, it becomes the duty of the Judge, as a matter of necessity, to propose such a statement. The law contemplates, therefore, that the statement by the Judge must be made from his recollection of the testimony, and when he states he has no recollection of the evidence, when separate statements are presented by the parties, it follows, that he is no longer competent of certifying from his own memory the facts established before, and upon which his

judgment was predicated. See Ship et al. vs. Cuny et al., 9 Martin La. 91.

The appellant in this case made his efforts to secure a statement of facts in a very short period after the rendition of the judgment.

It does not seem to have been his fault, that no agreement as to the facts was effected between himself and his opponent, and he was certainly not responsible for the inability of the Judge to remember the facts. He, therefore, should not be prejudiced, and as we cannot consider the case as it now stands, we deem it just that the case should be again tried in the lower court.

It is, therefore, ordered that the judgment appealed from be set aside, and the case remanded for a new trial.

The costs of this appeal to decide the final determination of the costs.

In the Matter of T. Reilley and C. E. LeBlanc, applying for the Approval of Warrants.

1. Where a statute purports in its title to "fix the salaries of all deputies and employees to be paid out of the judicial expense fund;" and, as a fact, such statute does not so fix such salaries, but merely attempts to make per centum reductions upon salaries as fixed already in preceding sections, there is a violation of Art. 29 of the Constitution of this State, requiring every statute to express its object in the title.
2. Where a statute, purporting to thus fix particular salaries, merely makes a per centum reduction upon salaries already fixed by preceding legislation, to which preceding legislation reference must still be made for the purpose of ascertaining the amounts of such salaries; held, such later statute is really an act amending the former ones, and hence, Art. 30 of the Constitution is violated; that Article prohibiting the amendment of statutes by mere reference to their titles, and requiring, in such cases, that the statute to be affected be re-enacted and published at length.
3. Act No. 108 of 1882, is, for the reasons given, unconstitutional, null and void.
4. It being the duty of the Judges of this Court to approve the warrants or vouchers of its officers, that duty requires of them to accord to such officers all that is lawfully theirs. The Judges of this Court must therefore determine for themselves what is lawfully due such officers, and to approve accordingly.

In the matter of Reilley and LeBlanc, applying for approval of warrants.

To the Honorable the Judges of the Court of Appeals in and for the Parish of Orleans:

The petition of Terrence Reilley and C. E. LeBlanc, residents of the City of New Orleans, respectfully represents:

That pursuant to the provisions of the Constitution, the General Assembly of the State of Louisiana, at its session of 1880, passed an Act bearing the No. 130, fixing the salaries of the various employees of the Civil and Criminal Courts of this Parish, whose salaries were to be paid out of the fund known as the "Judicial Expense Fund."

That by said Act the salary of each of your petitioners, as employees of this Court, either by confirmation or by appointment of your Honors, was fixed at the sum of one hundred and fifty dollars per month.

That said salary, by law, is made payable upon a warrant issued by the Auditor against the Treasury of the State, said warrant to be issued only upon presentation of a voucher signed by the clerk of the Civil District Court, *ex-officio* clerk of this Honorable Court, and approved by one of your Honors.

That at its session of 1882, the General Assembly enacted an Act bearing the No. 108, and purporting to be an Act to amend and reënact the Act above referred to, and to make a reduction of twenty per cent. on the salary of all employees paid from said fund.

Now, your petitioners aver that they are informed and verily believe and do so charge, that the Act No. 108 of the Session of 1882 is unconstitutional, void and of no effect, and on its face in direct violation of the provisions of Acts 30 and 48 of the Constitution.

That at the suit of State ex rel. Salvador Aber vs. Allen Jumel, Auditor, No. of the Seventh Judicial District Court of this State, a suit brought contradictorily with the State of Louisiana, to whose benefit said judicial fund enures, the said Honorable Court, by judgment now final and executory, declared said Act No. 108 of the Session of 1882, unconstitutional, null and of no

effect, and commanded the Auditor to issue his warrants to the relator, as per provisions of Act No. 130 of 1880.

Now, your petitioners represent that they are respectively docket clerk and minute clerk of this Court of Appeals, and that they have had issued to them a warrant on the Auditor for their salary for the month of May, 1883, by Jas. T. Clarke, clerk of the Civil District Court, *ex-officio* clerk of the Court of Appeals, for the sum of one hundred and fifty dollars per month. Petitioners respectfully ask the Honorable Judges of the Court of Appeals to approve said warrants, in order that they may obtain from the Auditor, on the treasury, the said amount, as provided for by law.

Petitioners respectfully pray that the Attorney General have notice of this application, in order that the relief asked for may be granted.

TERRENCE REILLEY, Docket Clerk.
C. E. LEBLANC, Minute Clerk.

I have no objections to the application of the petitioners.

J. C. EGAN, Attorney General.

Upon this application, whereof notice was duly sent to the Attorney General, and to which he has answered, by written declaration, that he had no objection to the granting thereof, and the Court, having examined the Act No. 108 of 1882, has arrived at the following conclusion:

That the title of said Act is to fix the salaries of all deputies and employees who are paid out of the "Judicial Expense Fund," whereas it does in no manner fix the compensation of the persons to be affected by it, but merely attempts to make reductions upon salaries already fixed by preceding statutes, to which preceding statutes reference must still be made to ascertain the sums to which the public employees in question are entitled; therefore, the title of the Act does not express its true object and, hence, we consider it in violation of Art. 29 of the Constitution. We have also concluded, that inasmuch as the said Act No. 108 of 1882 does not of itself fully regulate and determine the matters upon which it is directed, but leaves in force, as it were, for completion

of itself, the various Acts of 1880, which, in detail, regulate the subject; that it is, in truth, nothing but an attempted amendment of the several Acts of 1880, to which it relates, and which are referred to in the body of the said Act itself. Art. 30 of the Constitution prohibits the amendment of any statute, by reference to its title, and requires, for valid amendment, that the Act or section to be affected should be reënacted and published at length.

This Article of the Constitution, therefore, in our opinion, furnishes the second objection to the validity of the Act complained of. It is the duty of the Judges of this Court to approve the warrants of its officers, and this duty implies that such officers shall be accorded all that is lawfully theirs. It is an obligation, therefore, upon us to determine fairly what is the lawful amounts to which they are entitled and to approve their vouchers accordingly.

W. H. ROGERS,
FRANK MCGLOIN,
Judges.

NEW ORLEANS, June 4, 1883.

No. 147.

WILLIAM MAKESY *v.* MORAN, GALLOWAY & CO.

1. Where a debtor is attacked by one holding a formal subrogation from the original creditor, such debtor will not ordinarily be listened to raising issues of fraud and simulation as to such transfer or subrogation.
2. In no case can a transfer and subrogation be attacked for fraud without a special pleading of the fraud or simulation complained of.

Appeal from the Civil District Court, Division D. Rightor, J.

Chas. S. Rice for plaintiff, appellant.

E. W. Huntington for defendants.

MCGLOIN, J.—Plaintiff sues for $761.87, balance due upon commissions for obtaining a cargo of cotton for the Bark Leopold. He claims as subrogee of Albert Shultz. A writ of attachment

issued against defendants, as non-residents, and property was seized.

The question relative to admission of evidence under the second answer, the filing of which was not authorized by the court, is not a necessary one, as we do not find that the evidence so received establishes the averments of the amended answer.

There are other bills of exception, which are directed against the ruling of the Judge *a quo* in permitting the introduction of testimony going to establish fraud and simulation between Shultz and Makesy. The ruling complained of was clearly erroneous. Even a creditor of Shultz could not make such an attack without specially pleading the fraud or simulation complained of. Even if it be admitted, for the sake of argument, that *a debtor* can, without showing direct injury to himself, complain of such transactions upon the part of his creditor, yet he surely cannot escape the necessity of specially pleading the vices of which he complains.

The learned Judge *a quo* was also of opinion that the plaintiff had failed to substantiate his claim.

We have examined the evidence closely, and see no link missing in that which establishes the demand sued upon.

Judgment reversed, and a decree is now entered in favor of plaintiff for $761.87, with legal interest from judicial demand, and privilege upon the property attached, with costs in both courts.

No. 222.

PIERRE VERGES *v.* JEAN BAPTISTE CIER.

1. Where a contract, complained of as in fraud of creditors, has some reality, the creditor complaining cannot ignore the same and seize the property, as though never alienated.
2. The only remedy of the creditor in such a case is the direct, revocatory action.
3. Where, however, the transfer or contract impeached is a mere simulation, creditors may ignore it, and levy at once upon the property sought to be affected.

Appeal from the Civil District Court. Lazarus J.

Sambola & Ducros for plaintiff, appellant.

Branch K. Miller and *A. L. Tucker* for defendant.

ROGERS, J.—In execution of a judgment against Jean Berthin, defendant seized certain movable property in the Parish of St. Bernard. The sale of that property was enjoined by plaintiff, claiming the property as his own. The injunction, issued from a court without jurisdiction, was disregarded by the sheriff, who, at the sale, adjudicated the property to defendant. The injunction suit, on appeal, was dismissed for want of jurisdiction. This suit is brought to recover the value of the property so adjudicated.

The answer charges that the title of plaintiff to said property is simulated; that it really belonged to Berthin, defendant's judgment debtor; that the title of plaintiff was a fraudulent simulation to defeat defendant's rights.

An assignment of errors has been filed in this Court, setting forth that Verges did not acquire the property, the subject of this suit, from Berthin, but from one Jean Marie Abadie; that Abadie is, therefore, from the nature of the defence, a necessary party to the suit; that not having been made a party to the suit by defendant, the defence cannot prevail.

The theory upon which plaintiff bases his assignment of errors on the part of the court below, results from the application of the law as to executed contracts, apparently valid and binding, although in fraud of creditors; but under no circumstances does it apply to acts which are mere simulations, acts without any legal existence, either as to form or facts. If the plaintiff had shown a real title to the property he claims, although obtained by fraud, the defendant's action would have been disapproved, for the law would have required him to first directly set aside the sale as in fraud of his rights and it would then have been necessary to have made all persons in interest parties. McAdam vs. Soria, 31 La. An. 864; Vauderie vs. Eherman & Lecanu, 26 La. An. 388.

We are satisfied that neither Abadie nor Verges ever owned the property seized and claimed in this suit. That what is

asserted here by the plaintiff as a sale, has no foundation in fact. and that the defendant was justified in proceding against it as the property of Jean Berthin, and disregarding the pretence of Verges, who in this case has not taken the trouble to verify under oath, even on the allegations of his petition, though the evidence of three uncontradicted witnesses declare that he pointed out the very property to the sheriff for seizure as the property of Berthin. King, Admr., vs. Atkins, 33 La. An. 1064.

Judgment affirmed.

No. 175.

THOMAS J. MOUTON *v.* ROBERT OERLEIN.

1. Where plaintiff, of full age, took service as clerk with defendant, without any agreement between them individually as to rate of salary, the plaintiff will not be bound by any understandings, arrived at previous to the employment, between defendant and the father of plaintiff, but without plaintiff's knowledge or sanction.
2. To hold plaintiff bound as ratifying the understanding between defendant and his (plaintiff's) father, it must be shown that proper knowledge of all the facts was brought home to said plaintiff, so as to place him in full possession of all the terms and conditions of the said engagement, and enable him to act intelligently and knowingly with reference to them.
3. The fact that one witness alone swears positively to a fact, and there is no contradiction thereto, does not justify the court, in this case, in ignoring the adverse finding by the lower Judge as to such fact.
4. We cannot compel an inferior Judge either to believe or disbelieve any particular witness.

Appeal from the Civil District Court, Division D. Rightor, J.

Chas. S. Rice for plaintiff.

E. H. Farrar for defendant, appellant.

ROGERS, J.—The plaintiff alleges that he was engaged by the defendant as a clerk, from the first day of November, 1878, to the first day of August, 1879; that his services were well worth the

sum of fifty dollars per month; that he has received $120 on account and claims the balance, $330.

The answer denies generally all liability, alleging that plaintiff was taken into defendant's office at his (plaintiff's) father's request, under an agreement that defendant should pay him what defendant thought plaintiff's services were worth; that plaintiff's services were not worth ten dollars per month; that the amount paid him was received in full satisfaction and discharge and settlement of everything due plaintiff by defendant; that plaintiff was satisfied at the time of the said payment, and for nearly a year afterwards.

The Judge of the District Court found for plaintiff and granted judgment for the amount claimed.

The defendant appealed.

The statement of facts agreed to by counsel as filed, we give at length:

"Plaintiff proved his services to be worth $50 per month to defendant.

"Plaintiff was informed on the street that defendant wished to see him; he thereupon called at defendant's office. Defendant asked him if he was Mr. Mouton's son; he answered 'Yes.' Conversation ensued relative to service which defendant stated he wished plaintiff to perform in his office; the duties were explained and plaintiff set to work. Nothing was said about compensation then or afterwards, while he was in plaintiff's employ; he expected compensation. Two or three days thereafter, plaintiff learned that there had been a conversation between plaintiff's father and defendant, out of which the message on the street grew. Never knew or was told or enquired into the substance of that conversation. Plaintiff admits receiving the sums stated in petition and account. Plaintiff was of age and swore that his father had no authority to make a contract for him. The defendant *testified* that he had taken the plaintiff into his office at the request of his father to teach him the ship-broker's business, and had promised his father to give him whatever he might choose; that from time to time he had given the sums mentioned in the

petition, and had on one occasion ordered the bookkeeper to close the books by crediting plaintiff with a salary of $30 per month. The plaintiff's father was not sworn by either party. Defendant testified that he, the father, had appealed to his friendship not to summon him. There was no witness sworn or other testimony adduced to contradict the above statement."

I.

It is alleged as error, that having declared on a contract, and the statement of facts showing no contract was entered into between plaintiff and defendant, he could not recover on a *quantum meruit.*

The facts stated show a contract for hire of defendant's services, as a conclusion of law, between the defendant and plaintiff. The terms of an engagement made by a third person, without authority, cannot bind a party, unless the party ratifies such engagement. Such ratification cannot be presumed, unless the facts show that proper knowledge was brought home to the party so that he might be in full possession of the conditions and circumstances of the engagement, and be enabled to act intelligibly and knowingly in relation to them.

The facts stated having established a contract for hire of plaintiff's services, and no agreement was made as to compensation, the Judge did not err in receiving evidence fixing the value of the services contracted for. Bright vs. Metairie Ridge Association, 33 La. An. 62.

II.

The fact that the testimony of the defendant was not contradicted did not, as a matter of law, warrant the Judge in accepting his statements as proof. We have no authority to compel a Judge to believe or disbelieve a witness. Howe vs. Manning, 13 La. 412; Edwards vs. Cahawba, 14 La. An. 224.

We see no error in the judgment, and it is, therefore, affirmed.

No. 241.

JEAN CADILLON *v.* JOSEPH MALNOURY.

1. In cases appealable to this Court, upon questions of law only, the law questions involved can be introduced to the notice of this Court only by bill of exceptions, statement of facts or assignment of errors.
2. A party cannot, by endorsing what is truly a brief against a motion to dismiss, "Brief and Assignment of Errors," have this Court consider such a paper as constituting a legal assignment of errors.
3. The forms of practice cannot be blended and confused, for to permit this would be to destroy the harmony and symmetry of our system of practice.

Appeal from the Civil District Court, Division D. Rightor, J.

W. S. Benedict for plaintiff.

Simeon Belden for defendant, appellant.

ON MOTION TO DISMISS.

McGLOIN, J.—This controversy involves less than five hundred dollars, and our jurisdiction therein is upon questions of law alone. In such cases the questions of law involved can be introduced to our notice only by bill of exceptions, statement of facts or assignment of errors. There is, however, in this record neither bill of exception nor statement of facts; nor can we consider that there is before us an assignment of errors. Thirteen days after the filing of the record herein, appellant, defending himself against a motion to dismiss, files what is nothing more nor less than a brief in answer to that of the appellant and mover. To simply endorse such a document "Brief and *Assignment of Errors*," cannot alter its character and make it what the law requires in an assignment of errors. There are certain forms of practice which cannot be blended and confused at will, without destroying the symmetry and the harmony of our system. This Court could not tolerate in a mere assignment of errors the prolixity and argumentation which are usual and even proper in briefs; and our courts have also invariably refused to permit briefs to stand in place of formal pleadings.

The necessity for preserving distinctions, as we are doing in

this case, is well illustrated by a consideration of the document itself that is in question. It is endorsed, as already stated "Brief and Assignment of Errors," but its heading is, "Brief of appellant." It argues that the amount really in controversy is over five hundred dollars and, hence, the inference is, that no assignment of errors is necessary. It also contends that this Court can review the issues of law and ascertain what they are by a simple inspection of the pleadings, adding: "the only requirement that could possibly be urged would be an assignment of error of judgment, under the rules of this Honorable Court, which, on the grounds of answer in suit, with exceptions, we now urge as an assignment of error of judgment of lower court."

Surely, if such a document, and in such manner presented, is to be accepted as a formal and particular pleading, there would be an opening of doors to disorder and uncertainty, which must be intolerable at once to courts and to litigants.

We are not, therefore, called upon to determine whether the so-called assignment of errors was filed in time or not, for we consider that we have from appellant, in this connection, briefs, and nothing more.

Appeal dismissed at appellant's costs.

No. 171.

J. ROUTIER *v.* D. HUGHES *et al*—LOUIS R. SASSINOT, Intervenor.

1. Where suit is brought for $611.00 and an intervenor appears, claiming $388.00 thereof, and the final judgment is against defendant for the full sum originally claimed, $388.00 thereof in favor of intervenor, and the remainder in favor of the plaintiff; held, that, upon the appeal of defendant, the controversy must be considered as one involving the sum of $611.00, and hence, appealable to this Court on questions of fact, as well as law.
2. The provisions of La Rev. Statutes, Sections 2879, 2880, 2881, 2883, 2884, and of La. Civil Code, Arts. 2270, 2272, 2274, all popularly known as the mechanic's lien laws, are express and exceptional, and they must be restricted to cases coming clearly within their provisions.

3. These provisions of law apply only to cases where work is being done, by contract, *for the owner or proprietor.*

4. They cannot, therefore, be held to apply where the party, at whose charge the work is being done, is a mere *lessee,* and not the *owner or proprietor.*

Appeal from the Civil District Court, Division A. Tissot, J.

Albert Voorhies for Sassinot, intervenor, appellant.

Braughn, Buck & Dinkelspiel for defendants.

ON MOTION TO DISMISS.

McGLOIN, J.—Plaintiff sued defendants *in solido* for $611.00, with interest. L. R. Sassinot intervened, claiming that of this sum $388.71 should be adjudged in his favor. There was judgment in favor of Sassinot for the amount of his claim, and in favor of plaintiff for $222.29. Defendants, Hughes & Co., have appealed. The intervenor demands a dismissal as to himself on the ground that his demand is for less than $500.00, and hence appealable only on questions of law, and that there is neither assignment of error, bill of exceptions or statements of facts. The cause was tried below as one appealable upon questions of law and facts, and the testimony, etc., was taken in writing and is in the record.

It may be true that where a cause is appealable alone on questions of law, the mere presence in the record of the testimony reduced to writing does not do away with the necessity of the statement of facts as required by law and the rules of this Court; but we do not see the application of this principle. The character of the cause, in the connection under consideration, is determined by the amount claimed in plaintiff's petition, and if fully appealable as to him, it is equally so as to and against the intervenor, even though the latter claims less than five hundred dollars. The case comes clearly within the scope of the following authorities: Hart vs. Ludvick, 8 La. 167; Buckner et al. vs. Baker et al., 11 La. 462; Colt vs. O'Callahan, 2 La. An. 189; Haughery vs.

Thiberge et al., 24 La. An. 442; Picard vs. Weil & Wade, 30 La. An. 625; Alter vs. O'Brien, 31 La. An. 452.

The motion to dismiss is therefore denied.

ON THE MERITS.

Defendants, Hughes & Co., were lessees of certain public markets of the City of New Orleans, and as such entered into a contract with Geo. McNeil for certain repairs on said markets, amounting to $2125. McNeil sub-contracted with Routier for painting and some other work, at a total expense of $1200. Sassinot furnished Routier with paint and other material, amounting to $385.71. Routier sues Hughes & Co. and McNeil for an alleged balance of $611, the latter as first or principal debtor, and the latter, under the mechanic's lien laws, for anticipated payments. Sassinot intervenes against all for his bill. The judgment below is favorable to Routier and Sassinot, and Hughes & Co. alone have appealed.

Hughes & Co. are clearly under no liability to either plaintiff or intervenor, unless their case comes under the operation of the mechanic's lien laws of the State. La. C. C. Arts. 2270, 2272, 2274, and La. Rev. Stats. Sections 2879, 2880, 2881, 2883, 2884.

The legislation invoked is special and exceptional in its nature, and must be restricted to cases clearly within its provisions. A perusal of the Articles and Sections shows that they apply only where work is being done by contract for *the owner* or *proprietor*, and hence, we cannot extend them so as to cover cases where it is a *lessee* who is the principal contractant. To do so would be to do more than merely to interpret or enforce; it would be to amend the laws themselves.

The case being before us only as to Hughes & Co., we must limit our enquiry and action to them alone.

The judgment appealed from is, therefore, reversed as to defendants, D. Hughes & Co., and judgment is now rendered in their favor and against both the plaintiff and intervenor with costs of both courts.

MRS. SALLIE C. DAY AND HUSBAND *v.* NEW ORLEANS PACIFIC RAILWAY CO.

1. Where one suffers a Railway Company to enter upon his lands, lay its track across them, and run its trains, all without protest or objection, he cannot subsequently hold such Railway Company as a mere trespasser, because there has been no formal grant of the right of way.
2. One who was a Director of such Railway Company, and active in the management of its affairs, at the time the line is being constructed, and the track is laid across a plantation belonging to himself, and said track is unfenced; all thus done will be considered as authorized or done by him.

Appeal from District Court, Parish of Rapides.

White & Thornton for plaintiffs and appellants.

Andrews & Foster for defendant and appellee.

IRION, J.—This is a suit to recover of the defendant Company the value of stock killed by its trains on October 11th, and November 13th, 1882. The plaintiff contends that the defendant is responsible because the killing of petitioners' animals was caused by the negligence and carelessness of the employees of the Railway Company, because the said Railway Company has no right of way through her plantation, where the animals were killed, and was therefore a trespasser at the time of killing, and because even if not a trespasser in the eyes of the law, yet having no right of way, the Railway Company is legally liable for all injury to the property of petitioner occasioned by the running of their trains through the said Experiment Plantation. We have carefully examined the evidence in the record and we think the plaintiff has failed to show that the killing was caused by the carelessness and negligence of the employees of the defendant. As the burden of proof is on the plaintiff to show these facts affirmatively, under ordinary circumstances the plaintiff is not entitled to a judgment because of the negligence of the employees of the of the defendant.

The next position of the plaintiff is, that the ordinary rules governing the responsibility of railway companies do not apply to this case, because the defendant had no right of way through

the property of plaintiff, and is therefore responsible as a trespasser for all injuries to the property, whether the result of negligence or not.

We think the legal proposition is correct, if the defendant was a trespasser at the time the injury complained of occurred.

The evidence shows that the plantation on which the stock were killed was owned in part by Emory Clapp, who was the father of the plaintiff; that Emory Clapp was an active director of defendant Company; that he was greatly interested in the construction of New Orleans and Texas Pacific Railway, and that he aided, as an active, energetic director, in the prosecution of the work. It is stated by Mr. Kennard, one of the witnesses and a co-director, that "Mr. Clapp always impressed me as one of the most eager to have the road built, and gave repeated assurances with reference to whatever right of way might be needed through his premises. If possible, he manifested a greater interest than almost any member of the Board and expressed himself as having more interest, financially, in its success, than almost any other member of the Board, having property through which the road passed, the value of which was to be enhanced by the building of the road; with reference to the fencing, I would say that the queston was not mooted, that it was the settled policy of the Board, from beginning to the end, never to receive, under any conditions, rights of way with exceptional stipulations in favor of the grantors. It is to my personal knowledge, that whenever any attempt of that kind was made, it was promptly met and denied. Had any demand for fencing ever been made, it would undoubtedly, in accordance with the settled policy of the Board, have been denied. Mr. Clapp was a director most of the time that I served. He was an active, earnest worker for the Railroad."

Mr. Wheelock, another co-director, states: "That during all the time Mr. Clapp was a director, he took a leading part in all matters appertaining to the interest of the Railway Company. He never, at any meeting of the Board, or in my presence at any time or place, hesitated in expressing his entire willingness to grant the right of way with such grounds as might be necessary

and needful, free of charge, to the Railway Company through his property. About the fencing business, that question was never mooted, about putting up fences through his place or any other person's place; the right of way granted by Mr. Clapp was without conditions; no objection to same was ever made prior to the institution of this suit. It was the first time I ever heard of the question of a condition being required from the Company to put up a fence."

Other witnesses show that the road bed was constructed across the plantation of Mr. Clapp during his lifetime; that he died in 1880; that the plaintiff acquired the plantation in part by inheritance from him; that the Company proceeded to complete the road and run its trains thereon without objection or hindrance from her, and that prior to the killing of this stock, she made no demand upon the Company to fence its road through her premises.

Mr. Clapp, an active, energetic member of the Board of Directors, must have aided in establishing its settled policy for carrying on its operations. If, as Mr. Kennard testifies, it was the settled policy of the Board, while Mr. Clapp was a member, not to fence the track of the Company through any one's premises, and not to accept a right of way based upon conditions, it necessarily follows, that when Mr. Clapp allowed the defendant Company to enter his premises for the construction of that road, the permission was granted in accordance with the policy of the Board, as adopted and approved by himself, that the Company would not be required to fence its track. The premises of Mr. Clapp were entered and the construction of the road began under his directorship. It does not therefore seem possible that under these circumstances the defendant could have been a trespasser, even without a formal grant of the right of way. If so, Mr. Clapp, as a director, would have been a trespasser upon Mr. Clapp as the owner of a plantation. If it was trespass, he aided and abetted therein and induced his co-trespassers, by his counsel and advice, to commit the wrong. If, under these circumstances, Mr. Clapp were alive, he could not prosecute the defend-

ant as a trespasser, nor could he fix a greater responsility upon the Railway Company than if he had made a formal written grant of the right of way.

It seems clear to us that the original entry of the defendant upon the Experiment Plantation was legal, with the full consent of the owner, and that the Railway Company was not a trespasser. The work was never abandoned; it was interrupted for a time and the presumption is, that the work done was preserved for the Company by the plaintiff in the condition in which it was left. It does not appear that she interfered with their work in any way after she became the owner of the property. She did not resume the actual occupation of the land which formed the road bed; she did not notify the Company that, as her father had given no right of way, she would object to the continuance of the work or that she would subject their operations to the condition of enclosing the road with a fence. She allowed the Company to renew the work, to complete it and to run its trains upon the road, without any objection whatever. She therefore ratified, by her silence, the terms of the original entry and acquiesced in the work as it was done. The terms upon which the defendant Company first entered the Experiment Plantation were, that it should have the privilege of building its road across the Experiment Plantation without fencing it in, as appears by this testimony of Wheelock and Kennard. By her silence the plaintiff ratified these terms when the work was renewed, and she acquiesced in the construction of the road, in accordance with those terms, inasmuch as the Company proceeded to run its trains over the road without a fence, and without objection from her. It is stated by Pierce, in his work on Railroads, page 169, that: "A clear acquiescence in the Company taking possession and constructing its works under circumstances making it his duty to resist, if he intended afterwards to set up that it was illegal, will be treated as a waiver." See also Mills on Eminent Domain, page 173, Sec. 140. The same author says in Sec. 142, after a lawful entry has been made by the consent of the

owner, the parties entering cannot be considered as trespassers, although they afterwards fail to pay the award.

After a full consideration of the law and the evidence in this case, we have reached the conclusion that the defendant is not a trespasser and is under no greater obligation to the plaintiff to pay for stock killed than it would be had the right of way been formally granted in writing before the entry of defendant upon the premises.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed.

No. 168.

J. & P. LAMERLEC *v.* ANTHONY BARTHELMY.

1. Where a purchaser, evicted, asks relief against his warrantor, held, that he can recover from such warrantor only:
   1. Restitution of the price (originally paid by the evicted one).
   2. The amount of fruits and revenues, if these have been recovered from him with the property.
   3. The costs of suit in warranty, or of that brought by the original buyer.
   4. The damages suffered, if any, besides the price he has paid.
2. The party evicted cannot recover from his warrantor any sum, as damages, calculated upon the increased value of the property.
3. Neither can he recover counsel fees paid.
4. Where a universal legatee sells property belonging to the succession which comes to him, he thereby accepts.

Appeal from Civil District Court. Houston, J.

Chas. Louque for plaintiff.

E. Sabourin for defendant.

J. P. Hornor & Baker for Warrantor Duchesne, Appellant.

C. F. Buck & Wynne Rogers for City of New Orleans.

ROGERS, J.—The plaintiff, having been evicted from the title to certain real estate, brings this action in warranty against his vendor, the defendant, to recover the purchase price, $750. The defendant calls in warranty his immediate vendor and prior

vendors, Zanoli, Duchesne and the City of New Orleans; Duchesne asks for a judgment in warranty against the City of New Orleans, and in addition to praying for the same judgment against the City that may be rendered against them, Barthelmy and Duchesne ask for the further sum, each, of two hundred and fifty dollars counsel fees.

Judgment was rendered in favor of plaintiff for the purchase price, $750, with legal interest from judicial demand against defendant; in favor of Barthelmy against Duchesne for $650, with like interest, the amount of his purchase price, and in favor of Duchesne against the City of New Orleans for $170, with like interest, and also for amount of purchase price received by that corporation.

Barthelmy and Duchesne have appealed.

Inasmuch as both the appellants claim more than the amount of the prices paid by them and counsel fees, the first question to be answered is: can this increase both in the prices paid, as representing the apparent enhanced value of the property, and the damages alleged as counsel fees, be allowed under Art. 2506 La. Civ. Code?

The jurisprudence of this State on this subject received from the Supreme Court a full and pronounced review. So important was the question considered, that four separate opinions were delivered—one being in dissent by Justice Rost. Burrows vs. Pierce, 6 La. An. 298.

The Code of 1808 (Art. 57, p. 354), which provided that a person evicted could recover from his vendor the augmentation of value above the price paid, was omitted expressly in the Code of 1825; and the omission was made upon the request of the jurisconsults, who presented reasons why the rule provided by that Article should be abrogated. Immediately after the adoption of the Code of 1825, the Supreme Court passed upon the question. Morris vs. Abat et al., 9 La. 552.

It was there held that the increased value of the property could not be considered in affording the buyer indemnity under the warranty; but by the adoption of the Code of 1825, the

Article of the Code of 1808 (No. 57) was suppressed and the vendor's liability restricted by Art. La. C. C. 2506, to:

1st. The restitution of the price.

2d. To that of the fruits or revenues, if the party has been obliged to return them.

3d. That of costs occasioned either by the suit in warranty on the part of the buyer, or by that brought by the original buyer.

4th. The damages, where he has suffered any, besides the price that he has paid.

And, adds the Court, "to say that the word damages in this Article includes, as a loss of profits, the augmentation of the value of the thing sold, would be to thwart rather than carry into effect the express intentions of the Legislature."

This jurisprudence comes down to us this day, without dissent or interruption, and cannot and should not be now questioned. Quillier vs. Yoir, 10 La. An. 259; Delord vs. New Orleans, 11 La. An. 701; Weber vs. Coursy et al., 12 La. An. 535; Underwood vs. Lacapière, 14 La. An. 276; Sarpy vs. New Orleans, 14 La. An. 312; Dyson vs. Phelps, 14 La. An. 722; Sullivan vs. Goldman, 19 La. An. 12.

The law is equally clear as to the allowances of counsel fees. A very elaborate brief and an extended oral argument has failed to convince us that we are at liberty to award as damages that which has been distinctly and repeatedly held as not embraced by the provisions of Art. 2506 C. C. Melançon's Heirs vs. Robichaud, 19 La. 360; Hale vs. City of New Orleans, 13 La. An. 195; Williams vs. LeBlanoe, 14 La. An. 759.

As a special ground, Duchesne alleges that L'Hote, whom he represents as heir, by virtue, rather, through several lines of succession, never accepted the succession of which he was made universal legatee under a last will and testament. We think the record discloses an acceptance of the succession; the property left him by his wife, referred to in the inventory taken by L'Hote, was of right in his possession; La. Civ. Code, Art. 1609; and he

sold the same and received the price. La. Civ. Code, Art. 992; 1 McGloin, p. 171, Lacey vs. Ferguson.

The allowance of interest was alone questioned by the City of New Orleans, who seems to have been satisfied with the judgment of the District Court, as no appeal was taken. We cannot therefore enquire into this.

Judgment affirmed.

No. 172.

ALBERT HEIM *v.* JOHN POWERS.

1. Where defendant, owning horses and a carriage employed generally for hire, had placed a driver in charge, and said driver, without authority, invited a third person to a free ride in said carriage, during the course of which ride an accident occurs through the fault of the driver, held, that the owner of the carriage and horses is responsible.
2. From those who own and employ particular property, the public have a right to demand the exercise of skill, discretion, judgment and caution, in the using of such property.
3. The public have, therefore, a right to the personal supervision by every owner of the property belonging to him, and consequently to his personal liability for damages occasioned by its misuse, or by the careless supervision, or controlling thereof.
4. Consequently, if the proprietor places another in his stead, as custodian or supervisor of such property, such proprietor is responsible for the negligences, etc., of his representative in failing to prevent injuries to third persons, occasioned in any way, not unavoidable, by or in connection with such property.
5. The driver of a carriage, ordinarily let out *for hire*, is the representative of the owner for the safe-keeping of the vehicle, as well as for the mere driving thereof; therefore, although at the time of the infliction of the damage in this case, the particular driver in question was driving a friend *gratuitously*, he remained the agent of the owner,

Appeal from the Civil District Court, Parish of Orleans, Division E. Lazarus, J.

Braughn, Buck & Dinkelspiel for plaintiff.

J. O. Nixon, Jr. for defendant and appellant.

MCGLOIN, J.—Plaintiff sues for $251.40, damages, alleged to have been occasioned him by the negligence, drunkenness and

consequent unskilfulness of defendant's servant and employee, while the latter was in defendant's employment.

There is an agreed statement of facts, whereby it is shown that defendant kept carriages to hire; and, on or before February 27th, 1881, he had placed one carriage under the charge of a certain Anatole Penneguy as driver; that said Penneguy, on said date, went to the Parish Prison in this City, and invited C. C. Cain, then captain in charge of said Prison, to take a free ride in the carriage, which invitation was accepted.

The statement of facts shows further that, during the course of this drive, a phaeton and horses owned by plaintiff was run into by the carriage of Powers, which said Penneguy was driving, and that the collision was due entirely to the fault of said Penneguy, who was drunk at the time, and driving on the wrong side of the road.

The result of this collision was that one of plaintiff's horses was so seriously wounded, that he died within nine days after the infliction of the injury, and the phaeton itself and the harness were damaged. The Judge *a quo* held defendant responsible for the fault of his driver and fixed the damage at $215.40.

The defendant, appealing, demands the reversal of this judgment, contending that Penneguy was his agent only for the purpose of running his carriage for hire, and that the moment said Penneguy undertook to employ the vehicle in driving persons gratuitously, he was acting beyond the scope of his authority, and all that he did were his own acts, for which his principal was in no manner responsible. He cites in support of this position: Gerber vs. Viosca, 8 Rob. La. 151; Le Breton vs. Kennedy, 27 La. An. 432; Dyer vs. Rieley and Leathers, 28 La. An. 6; Richoux vs. Mayer Bros., 29 La. An. 828; La. C. C. 2320; McManus vs. Crickett, 1 East. 106; Thompson on Negligences, Vol. II, p. 885, §§3, and 865, *et seq.*

Whatever may be the law in this State, as found in our reports, with regard to the malicious acts of an agent, certainly as to his negligence, and want of skill in the performance of his duties, there is no question of the master's liability.

Those who are brought into contact with the affairs or property of any person, have a right to exact of that person an exercise of due skill, judgment, discretion and caution, so that they may not be made to suffer by the manner in which such business is conducted, or such property controlled. If the proprietor retains personal charge of his affairs, or of his property, he is individually responsible for the management or control thereof. If, in the conduction of such business or the keeping of such property, the proprietor does any act whatever that is injurious to others, such proprietor is clearly liable. This is certainly a valuable guarantee in favor of third persons, and one which is accorded and preserved by the law. Third persons have, therefore, as it were, a property in this personal liability of the proprietor. In other words, they have an interest that the business of every man shall be governed and his property controlled by himself, with the consequent individual liability; and, so far as such third persons are concerned, the proprietor cannot divest himself of the obligation of personal management and care.

If, for his own convenience, the principal substitutes another in his own place, in the doing of these things, he may do so, and so far as they are not affected, third persons cannot complain, But the moment that such third persons begin to suffer from what is done in the conduction of such business, an interest in their favor springs up, and the substitution should not be permitted to affect their rights, by abrogating the personal responsibility of the principal.

We are not called upon in this case to determine the application of these principles to the torts of the agent, committed in the performance of the work or duty for which such agent is employed, or to deal with the conflict that exists upon this point among our authorities. The case is put before us as one of negligence and recklessness, and not of malicious wrong-doing, and in cases such as this, the precedents are clear and harmonious. Gaillardet vs. Demaries, 18 La. 490; Hart vs. N. O. and Carrollton R. R. Co., 1 Rob. La. 178; Camp vs. Church of St. Louis, 7 La. An. 324; Fitzgerald vs. Ferguson, 11 La. An. 396; see also

Pothier on Obligations, §§121, 453; Touillier, Droit Civil, Book 2, tit. 8, §284, Vol. 11.

The law is equally settled, and its justice is manifest, that the liability of the employer only extends to the acts of the employee, done within the scope of his employment, and in connection therewith. See authorities cited above.

The error of defendant, however, seems to us to lie in the attempt to confine the agency of Penneguy to the mere matter of driving the carriage of said defendant for hire. We consider that his employment was not confined alone to such driving, but that he was also charged with the duty of keeping and controlling the vehicle and horses, from the time the latter were taken out in the morning until they were returned at night, or before, into the stables of defendant. This portion of his undertaking, at least, Penneguy certainly performed in a reckless and grossly negligent manner, and Powers, as the principal or employer, is responsible.

We are referred to McManus vs. Crickett, 1 East. 106, to be found also in Thompson on Negligence, Vol. 2, p. 865. It is not necessary for us to declare whether that case meets with our approval or not, for it was one involving a wanton and malicious act on the part of the driver of defendant's vehicle; and that now before us turns upon a question of negligence alone.

Nor do we consider the citations made in that case from Brooks' Abridgment and 2 Rolle's Abridgment, 533, as more applicable. Had the servants in the cases supposed been in charge of the beasts as guardians, and permitted them negligently to enter upon the land of another, certainly this would have been something for which, unquestionably, the owner of such beasts would have been responsible.

In the citation taken from Noy's Maxims, the particular question now before us does not appear to have been involved; but, if the servant charged with the duty of distraining was also charged with that of conducting the distress, for his Master, to a place of safe-keeping, and in the course of the driving to such

place the animal was ridden by the servant and injured, the master would have found it difficult to escape.

We see no error in the judgment appealed from, and it is affirmed with costs.

JOSEPH BLOCK *v.* O. FONTENOT, ASSESSOR.

1. A party who has complied, in whole or in part, with the judgment against him cannot appeal.
2. Where a demand for reduction of an assessment has been rejected; and, under Sec. 40 of Act 77, of 1880, the Court, in its judgment, has assessed a fee against the tax-debtor, suing, and in favor of the District Attorney; and where said tax-debtor has paid such assessed fee—held, that there has been a partial acquiescence, or compliance, and the right of appeal is lost.

Appeal from the District Court of the Thirteenth Judicial District, Parish of St. Landry. Hudspeth, J.

John N. Ogden for plaintiff and appellant.

Perrodin & DuRoy for defendant and appellee.

ON MOTION TO DISMISS.

IRION, J.—The appellee has moved to dismiss this appeal, on the ground that the appellant has acquiesced in the judgment appealed from by voluntarily executing the same. The suit is a proceeding, on the part of the plaintiff, to have his assessment reduced. The Court *a qua* refused the relief asked for, and in addition gave a judgment against the plaintiff for twenty dollars, as a fee for the District Attorney, who represented the defendant assessor. It appears that the plaintiff voluntarily paid this fee, as ordered by the Court. Sec. 40 of Act No. 77, of the Acts of 1880, provides, that "whenever judgment, in any suit relating to taxes, is rendered in favor of the collector, or other officer representing the State, the Court shall adjudge that the party against whom the judgment is rendered shall pay to the District Attorney five per cent. on the amount collected." This is not properly a reconventional demand. It is in the nature of a pen-

alty which the law fixes and which the Judge, in the language of the law, shall decree that the taxpayer shall pay to the District Attorney.

The fee is dependent upon the amount of the judgment against the taxpayer. If the judgment should be changed, on appeal, the fee being a per cent., upon the amount of the judgment, must also be necessarily changed. It is therefore a part of the judgment, which latter cannot be reviewed without necessarily reviewing the per centum assessed by the Judge as a fee.

In the Succession of Egana, 28 An. 59, the Supreme Court said, "It cannot be controverted, that under the laws and jurisprudence of this State, the party who voluntarily executes, either partially or *in toto*, a judgment rendered for or against him, or who voluntarily acquiesces in or ratifies, either partially or *in toto*, the execution of that judgment, is not permitted to appeal from it."

We think the plaintiff has voluntarily executed the judgment, so far as he was commanded to do anything, and the motion to dismiss must be sustained.

It is therefore ordered that this appeal be dismissed at plaintiff's cost.

Rehearing refused.

WILLIAM M. PRICE *v.* LEHMAN, ABRAHAM & CO.

1. Where property is seized under conservatory writ and bonded, it returns to the custody of the defendant in the same condition as it was before seizure.
2. Therefore, privileges existing upon it, before the seizure, are not affected.
3. It is the same with regard to the very privilege to secure which the writ issued; after judgment, the privileged creditor may, notwithstanding a release upon bond, subject the property to his execution.
4. Pending a revocatory action to set aside a fraudulent sale, the fraudulent vendee cannot lawfully dispose of the property affected. La. C. C. 2453.
5. Where such an action was accompanied by an attachment, and the property affected, being seized, was released upon bond, the bonding does not remove the prohibition against disposition of the property, pending the suit; and, succeeding in his suit, the attacking creditor may ignore alienations, and pursue the property into third hands.

Appeal from the Parish of St. Landry. Hudspeth, J.

Lewis Bros. for plaintiff and appellant.

K. Baillio for defendants and appellees

IRION, J.—The only question presented by this case is purely one of law.

The defendants were the creditors of William C. Johnson, who divested himself of all the property he owned, by transfers to various parties. Lehman, Abraham & Co. instituted an action against Johnson and his transferees to set aside all the sales made by him, in order to subject the property to the payment of their claim.

Among the property sold was the lease of a storehouse, for a term of years, and a lot of merchandise contained therein, transferred to A. P. Williams. Williams was made a party defendant in the suit to set aside the sale made to him; a writ of attachment was obtained, and the lease, together with the contents of the store, were attached. Williams obtained the release of the property attached by giving a bond, as the law provides in such cases. He then sold it to Daniel Price, who sold to the plaintiff in this case.

Lehman, Abraham & Co. were successful in their suit to set aside the sales made by Johnson. The sale to A. P. Williams was decreed to be a nullity, and the property transferred to him was adjudged to be subject to the payment of the claim of Lehman, Abraham & Co. Execution was thereupon issued and the lease of the storehouse was seized. William M. Price, transferree of the lease, enjoined the sale on the ground that the bond of release, furnished by Williams, stood in the place of the property attached; that Lehman, Abraham & Co. could not pursue the property for the release of which the bond had been given, but must look to the bond alone for satisfaction of their execution. The judgment of the Court *a qua* was in favor of defendants, and the plaintiff has appealed.

The question for our consideration is well stated by the counsel for the plaintiff, in his brief, in the following words: "The plaintiff in a revocatory action, having joined to his action

a writ of attachment, and the defendant having given a release bond, as provided by Article 259, C. P., is the recourse of the plaintiff thereafter confined to the release bond, or is his recourse both upon that and upon the property attached?" There in so question that the property seized, in the hands of the present plaintiff, could be made responsible for the judgment of Lehman, Abraham & Co. against Johnson, had it not been for the attachment and the release bond; it only remains to consider what was the effect of the release bond given by A. P. Williams.

In the case of Charles A. Conrad vs. Joseph Patzelt, James Jackson, Intervenor, 29 La. An. 465, Judge Marr, as the organ of the Court, entered into a very exhaustive and able elucidation of the effect of release bonds. The whole jurisprudence of our State on this question was fully examined and the effect of a release bond well established.

The conclusion which the Court reached was clearly stated. It said, when property provisionally seized, or seized on any other mesne process, is released on bond, it is not in legal custody, and it returns to the custody of the defendant precisely in the condition in which it was seized, except *quoad* that seizure; the bond has been substituted for it, and it cannot be again seized under the same writ.

In that case, Conrad, the lessor, provisionally seized the property of the lessee, Patzelt, who obtained the release of the seizure, by furnishing a bond. That Court held that the property then returned into the possession of Patzelt, in the same condition it was in when seized. The bond did not destroy the lessor's privilege and right of pledge, which still existed in favor of Conrad, notwithstanding the bond of release. The Court said, "when the seizure was set aside, Conrad's right of pledge was not extinguished, and if the property had remained in his hands it would have continued subject. But that which the release on bond did not do, was fully accomplished by the removal of the entire property out of the premises of Conrad into the store and premises of Jackson, and by the lapse of fifteen days after that removal; and Conrad's right of pledge, which existed for fifteen days and for fif-

teen days only after removal, was extinguished." Conrad thus lost his rights over the property by the prescription of fifteen days and not by reason of the release bond.

His privilege having been thus lost, that of the second lessor attached and was recognized.

In the case of Blanchin vs. Fashion, 10 La. An. 49, the same principle was recognized.

Blanchin sued the Steamboat Fashion and owners, and caused the boat to be provisionally seized. The boat remained in the custody of the sheriff one day, and the seizure was set aside on a bond, conditioned exactly as the bond in this case. At that time privileges against steamboats were prescribed by the lapse of sixty days. Blanchin's account began in January, and on the 10th of March, he recovered judgment for the whole amount, and on the 23d of March, the boat was seized by the sheriff, under a *fi. fa.* issued on that judgment. The proceeds of sale under this writ were brought into Court for distribution, and Blanchin claimed the whole amount of his debt with privilege. The Court said, "the release on bond did not extinguish the privilege for which the seizure was made. It simply left that privilege in the exact condition it was at the time the release bond was given." In that case the right of the plaintiff to seize the boat was recognized, although it had been released on bond.

In the case of Brandon vs. Bobo, 12 La. An. 616, property was seized under execution. The defendant gave a forthcoming bond, and sold it to a third party before the day fixed for its return. The Court held that the title of the purchaser was good, and that the only recourse of the creditor was on the bond. There is no difference in the principle recognized by the Court in these cases. While the property was in the possession of Bobo, before its seizure, he had the right to dispose of it as he pleased, and could therefore give a good title to a purchaser. The seizure by the sheriff interrupted this right, but the seizure was set aside by the bond. The moment the bond was furnished, there was no longer a seizure. It was set aside by the bond, and the property returned to the possession of Bobo, with all the rights over it

which he had before the seizure. It followed that as he could give an unencumbered title to the property, before it was seized, he could also make a good title to a purchaser, after it was restored to him on bond.

It is clear that the principle enunciated in Conrad vs. Patzelt, and all the cases there reviewed, is that the sole effect of a release bond is to restore the property seized to the owner, subject to all the conditions which burdened it before the seizure was made. If we apply this principle to the case at bar, we think the solution is easy. In the revocatory action which we have been considering, Lehman, Abraham & Co. stood in the place of Johnson, suing for recovery of property in the possession of Williams, who, by Article 2453 C. C., was absolutely prohibited from disposing of the property during the pendency of the action.

When the property was attached, it was taken into possession by the sheriff, to hold until otherwise ordered by the Court, and when the attachment was released by the bond, the property was restored to the possession of Williams, subject to the same prohibitions which burdened it before it was attached. In all the cases cited by counsel for the defendant, there was no prohibition upon the owner to dispose of his property. When it was burdened by a privilege it was restored to him on furnishing bond, subject to that privilege, and when the privilege was lost by prescription, he could convey a good title to a third person. This was not the case with Williams. The moment he was made defendant in the revocatory action he rested under a positive prohibition to dispose of the property, during the pendency of the suit. The release on bond did not remove this prohibition, any more than the release on bond extinguished the privilege of plaintiff, in the case of Conrad vs. Patzelt, and Blanchin vs. Fashion. In both these cases, as already stated, the Court held, that the release on bond did not extinguish the privilege and the property returned to the owner, subject to the privilege. So the property bonded here by Williams returned to his possession, subject to the prohibition, under which the law placed him, and

from which he could not escape, except by a judgment of the Court decreeing his title from Johnson to be valid.

It necessarily follows, that the sale made by Williams, as well as the subsequent transfer by his vendee, was void as to Lehman, Abraham & Co., who have the right to seize the property, as if these sales had never been passed.

We see nothing inconsistent in the cases of Ranlett vs. Constance, 15 La. An. 423, and Conrad vs. Patzelt, 29 La. An. 465, and the cases there reviewed.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be affirmed with costs.

NEW ORLEANS INSURANCE CO. *v.* BERKSON BROTHERS.

Although the action of nullity may lie, in some cases outside of those specially enumerated in the Code, where equity demands absolutely the granting of relief in such form; yet such action of nullity will not be tolerated, where the party complaining could have attained justice by means of an appeal.

Appeal from the Parish of St. Landry. Hudspeth, J.

Martel & Tansey for plaintiff and appellee.

Henry L. Garland for defendants and appellants.

MOORE, J.—This is a suit to annul and avoid a judgment rendered in favor of defendants against the plaintiff Company, as garnishee, in a suit entitled Berkson Bros. vs. S. R. Walker, No. 12,882 of the docket of the District Court.

The judgment rendered in said suit was for $231.44, with legal interest thereon, from the 3d of March, 1880, and costs. It was rendered against the plaintiff Company, as garnishee, and the defendant, S. R. Walker, and signed by the Judge of the District Court on the 28th day of May, 1881.

From this judgment *none* of the parties, against whom it was rendered, appealed, although plaintiff in this suit was duly notified of its rendition on the 13th of June, 1881.

It has therefore become final.

The defendants in the present suit filed in the court *a qua* the exception, "that the matters at issue in this case have been finally passed upon in said suit of Berkson Brothers vs. S. R. Walker et al., that the only remedy of said Insurance Company, to which it was entitled for relief against said judgment, was a new trial, or an appeal.

"That said plaintiff Company has no right of action to annul said judgment."

This exception was referred to the merits, and after trial, judgment was rendered in favor of the plaintiff Company, annulling and avoiding said judgment against it, in so far as it is concerned.

The defendants have appealed.

We are of opinion that the plaintiff Company should have sought relief against the judgment rendered against it, and which it seeks in this action to annul, by an appeal. We do not think that it has selected the proper remedy. No grounds for the action of nullity are shown to exist. This exception should have been sustained. 1 R. 523; 6 An. 250, 799; 9 An. 198, Gilmore vs. Gilmore; 23 An. 146; 27 An. 36-7; 31 An. 582. The action of nullity should have been dismissed.

It is therefore ordered, adjudged and decreed, that the judgment of the court *a qua* be reversed and avoided.

It is further ordered that plaintiff pay costs in both courts.

ON APPLICATION FOR A REHEARING.

MOORE, J. The plaintiff in this case has filed an application for a rehearing, on the grounds that the judgment rendered by us is contrary to law and the evidence.

It has failed to indicate to us in its application the points of error in our opinion of which it complains, or to furnish us with any authorities supporting its application, or the grounds upon which it is based.

Notwithstanding this, we have carefully reviewed the opinion rendered by us and the authorities upon which it is based, in order to ascertain whether there is error therein or not.

In the case cited by us, entitled Chinn vs. The First Municipality of New Orleans, which was an action of nullity of a judgment rendered by the District Court, the Supreme Court says: "Where a judgment has been obtained against a party, in a case not *expressly included* among those in which the Code of Practice prescribes that an action of nullity will lie, and he shows that he will sustain real injury unless he can obtain relief, which cannot be had on appeal, * * * relief may be granted, * * * but *not unless applicant* state particularly and specially the nature of the defence, etc., *and prove that he has been guilty of no laches.*"

In the case of Bird vs. Cain, 6 An. 250, which was a suit wherein plaintiff, against whom a judgment *had been rendered as garnishee*, sought to annul said judgment and enjoined its execution, the Supreme Court uses the following language: "Being of opinion that there was no irregularity in the proceedings which can be reached by an action of nullity, and that the parties should have sought relief, if any they were entitled to, by *an appeal*, the judgment in this cause must be reversed."

In the case reported in 23 An., page 146, the Court says: "It has been often held that a judgment may be annulled upon equitable grounds, *in case an appeal* would have afforded no remedy, * * * *and the party has been guilty of no laches.*"

In 27 An. at page 37, which was also an action of nullity, the Court uses the following language: "After examining the case, we find the plaintiffs have mistaken their remedy. It was an appeal. Their main defence to the suit was that the tacit or legal mortgage set up was not inscribed prior to January, 1870. On this point the evidence is as ample in the original suit as in the present action. Relief was *therefore attainable by appeal;* consequently, an action of nullity will not lie."

We think the plaintiff should have appealed. It had ample time and opportunity for doing so, and was guilty of laches in not doing so, within the time prescribed by law.

Rehearing is therefore refused.

No. 224.

ALLEN, WEST & BUSH *v.* THE SUN MUTUAL INSURANCE CO.

1. Where an insurance policy against fire contained the stipulation: "Wherever the insured does not enjoy the full ownership of the property insured, he is required to disclose to the Company the nature of his insurable interest, and to cause the same to be inserted in the policy, otherwise the policy shall be null and void;" held, a failure to comply with such condition, releases the insurer.
2. Though stipulations in policies favorable to the insurer are to be strictly construed, yet Courts cannot, in order to uphold the policy, disregard its formal declarations, or go beyond the written law, by attaching to terms employed, significations at variance with positive legal definitions.
3. The expression "full ownership," as above, signifies, under the laws of this State, full and entire title, to the exclusion of all adverse interest.
4. Therefore, where the interest involved is merely a right of pledge and retention, for advances and supplies, there is not "full ownership" in the insured, and the risk is affected by the clause cited.

Appeal from the Civil District Court, Division D. Rightor, J.

A. Goldthwaite and *B. K. Miller* for plaintiffs and appellants.

Leovy & Kruttschnitt for defendant and appellee.

ROGERS, J.—Plaintiff brings suit to recover the sum of $700, based on a policy of insurance issued to them for account of S. & T. L. Morrow, on cotton ginned and unginned, loose and in bales, contained in a two story frame, shingled, gin-house, situated on the Woodburn Plantation, Parish of Tensas, in this State. The defence is that the cotton, as described in the policy, which was destroyed by fire, was not the property of the Morrows; that under a clause which provides that, "whenever the insured does not enjoy the full ownership of the property insured, he is required to disclose to the Company the nature of his insurable interest and to cause the same to be inserted in the policy, otherwise the policy shall be null and void," the Company is released.

The testimony shows that about twelve or fifteen bales were destroyed, five of these were the property of the Morrows, the others belonged to their tenants or customers, who had sent the cotton to the gin to be ginned and baled; that the Morrows had on said cotton, lien and privilege for the payment of certain advances. It is contended that this condition entitles them to

the amount of the policy, as they had *full* ownership, in full and absolute interest, and with entire dominion over the cotton. It is not disputed that plaintiffs have shown an insurable interest in the ten bales belonging to their tenants, the question is, has that interest been made the subject of the contract of insurance? To answer this in the affirmative, it becomes necessary to determine whether such condition, constitutes ownership of the property insured.

The Civil Code, in declaring the general principles of ownership, speaks of perfect and imperfect ownership as the two divisions of ownership; the term *full* ownership does not appear anywhere in the text, nor is it material to determine that the terms "full ownership" and "perfect ownership" are synonymous in law, though so recognized in the uses of the English language. Roget's Thesauras, pp. 52–729–31 (marginal); Worcester, verbo, "Full," "Perfect."

The insured represented, at the time of the contract, that they were the owners of the property, under the warranty expressed in clause XIX. In Louisiana, this meant that the property insured and described in the policy belonged to them, to the exclusion of all other persons, C. C. Art. 488; acquired by one of the modes pointed out by the Code; and the use of the term "full ownership," must be taken as explaining that simple, perfect and absolute dominion over the cotton, understood by our law and by the Roman law. 8 La. An. 172, State vs. McDonough.

This was sufficient to exclude all idea of subordinate rights. Possession and ownership of a thing are entirely distinct. C. C. Art. 496.

There may be a modified ownership, that is, when the *owner* consents to the possession or dominion in another, in the case of a pledge, for example, but the qualities exist still. Oliver vs. Lake, 3 La. An. 83; Allen, Nugent & Co. vs. Buisson, 35 La. An. 108.

That the condition of *ownership* of the property insured was meant, can be well inferred from another clause of the instrument, viz., Condition III:

"Property held in trust, or on commission, must be insured as such." It cannot be said that the risk would ever have been written, if plaintiffs had declared that the cotton insured belonged to other parties and was in their possession by virtue of a claim or privilege for advances. Such facts undoubtedly constitute an insurable interest, and a contract made in accordance therewith undoubtedly valid. But while it is true that the conditions and warranties, in policies of insurance, being stipulations in favor of the companies, should be strictly construed, courts will not be justified in going beyond the written law to fix a liability, upon the proof of conditions that are at variance with its most formal declaration, as to the results flowing from the use of terms to which it has given a most positive definition. We are asked to follow the opinions expressed in Noyes vs. Hartford Insurance Co., 54 N. Y., 668 and Hough vs. The City Fire Insurance Co., 29 Conn., p. 20, but we do not deem it proper to go beyond our law.

It has been said by the Supreme Court, affirmed in numerous decisions, the titles and the modifications of the rights of property, under our laws, are few and easily understood; they answer all the purposes of reasonable use; and it is the duty of courts to maintain them in their simplicity. The gravest consequences, the most dangerous confusion, and the disturbance of public order must follow any attempt to introduce, within our limits, with all their train of intricate and, except to the initiated, unintelligible modes and distinctions, the titles to property supported by the complicated and involved jurisprudence of the Common Law States. 3 La. An. 212; 4 La. An. 71-79-377; 7 La. An. 46-395-498; 8 La. An. 171; 7 R. 481.

The only cotton insured, *owned* by plaintiffs, was the five bales, and for the value thereof, the Judge *a quo* gave judgment, rejecting, in our opinion, very properly, the claim for the additional ten bales upon which, at best, plaintiffs had but a lien and privilege, but of which they were in no sense the *owners*.

Judgment affirmed.

No. 221.

A. EMILE SCHEIDECKER *v.* LAURENT DUMESTRE.

1. Where, the evidence in a cause is not brought up, and the record contains no statement of facts, or bill of exception, no assignment of errors, the appeal will be dismissed.
2. Where, however, in such a case, the appellee has filed an answer to the appeal, praying for relief for some matter patent, the appeal will stand for the purpose of relieving him, if entitled thereto.
3. There is no law authorizing a Judge *a quo* to divide the costs between a plaintiff and a defendant. If the plaintiff succeeds, even partially, he is entitled to his costs.

Appeal from Civil District Court, Division D. Rightor, J.

Chas. Louque for plaintiff and appellant.

P. S. Peyroux and *John S. Tully* for defendant and appellee.

MCGLOIN, J.—Plaintiff in this case, alleging exclusive ownership in himself of a party wall, and that defendant, without having paid any portion of the expense of said wall, is making or attempting to make use of the same, prays to have defendant enjoined from so using said wall and for damages in the sum of five hundred dollars. Defendant, in answer, avers that the wall was not the individual property of plaintiff, but was common, and had been so used in the past; and assuming the character of a plaintiff in reconvention, he demands damages in the sum of fifteen hundred dollars.

Upon the trial, it seems that testimony was taken for both parties, but none has been stamped according to law; hence, under the authority set in Fink vs. Queen Ins. Co., McCloskey vs. Carrol, and Ducros vs. Hymel, we cannot consider it.

There is in the record no bill of exception, nor assignment of errors, nor statement of facts, nor has any evidence come up before us. The appellant, therefore, has not complied with the law which governs the bringing up of appeals, and were he alone concerned, we should have dismissed this appeal.

Plaintiff, however, has filed an answer, in which he complains that, although the court *a qua* has granted him a judgment per-

petuating the injunction applied for, yet one-half of the costs have been decreed against him. He asks us to amend the judgment in this respect.

We were at first in some doubt as to our right, in default of a bill of exceptions, assignment of errors or statement of facts, to take any action other than to dismiss. An examination of the Code of Practice, however, has satisfied us that in cases such as this, an appellee is not at the mercy of a negligent appellant.

Code of Practice, Art. 592, declares that an appellee, complaining of some parts of the judgment of the inferior court, "may *without appealing from the same*, pray it to be set aside on those points, on which he believes he is aggrieved."

This accords to an appellee a distinct and particular interest in the appeal of his adversary, and it would be manifestly not in consonance with justice, were the preservation of that right or interest to depend solely upon the volition or upon the acts of the appellants. The Code of Practice has not left appellee thus in the power of the appellant; for, once the order of appeal has been duly perfected, and notice thereof has been given, it cannot be withdrawn by appellant (C. P. Art. 594); and if the latter does not choose to bring up the record, the appellee can do so, and obtain from the superior court a dismissal, or a final determination. C. P. Arts. 588, 589, 590.

So, in a case like this, where the appellant has failed to place the cause before the Appellate Court in such manner as to enable such Court to pass upon it, the appellee is still, to some extent, protected, for he can file his answer demanding an amendment. C. P. Arts. 592, 888, 890.

And the Article No. 888 enables such appellee to make his answer subserve the purposes of an assignment of errors, for it provides that he may, "without appeal on his part, state in his answer the points on which he thinks he has sustained wrong, and may pray that the judgment be reversed with respect to them, and confirmed with costs on the rest."

Where the errors on which an appellee relies are those of law, appearing upon the face of the record, the answer, as provided

for in Art. 890, clearly accords to an appellee, under the circumstances being considered, a privilege which is similar to that accorded an appellant by C. P. Art. 897, which latter Article authorizes the filing of an assignment of errors.

In this case plaintiff, having succeeded at least partially in the lower court, was clearly entitled to his costs. C. P. Arts. 549, 550, 551.

We know of no law authorizing the Courts of this State to divide the costs, as has been done in this case, and there has been nothing shown which justified such dividing in this matter.

The judgment is a matter of record herein, as also the petition and answer. These show us that in a decree according to a plaintiff a portion of what he has demanded, said plaintiff has been made to pay a part of the costs. This is an error "appearing upon the face of the record," and one which we are competent, under the circumstances, to correct.

The judgment appealed from is therefore amended, so as to impose the entire costs of the lower court upon defendant and appellant, but in other respects said judgment remains undisturbed. The costs of appeal are likewise to be paid by defendant and appellant.

No. 220.

SUCCESSION OF SUSAN B. THOMAS.

1. In a contest for administratorship of a succession, appellate jurisdiction depends solely upon the amount or value of the assets of the succession.
2. To support the jurisdiction of this Court in such a case, it must be made to appear plainly that the value of the succession is within the limits assigned to this Court, by the Constitution of the State.
3. Where the only real showing of such value is the statement of a witness, given while testifying, that he once owed the deceased a certain sum, but that the debt is prescribed, such showing is not sufficient to sustain our jurisdiction.
4. An affidavit is not sufficient to support our jurisdiction, unless it shows not only that the amount in dispute is not *below* our jurisdiction, but, also, that it is not *beyond* it.

Succession of Thomas.

Appeal from Civil District Court, Division D. Rightor, J.

Geo. L. Bright and *H. L. Edwards* for Louis J. Bright, appellant.

J. B. Guthrie and *A. H. Wilson* for E. T. Merrick, appellee.

ROGERS, J.—Louis J. Bright claiming to be a creditor of the deceased, Mrs. Susan B. Thomas, applied to the Civil District Court for letters of administration.

His application was opposed by Edwin T. Merrick, and the Judge of the lower Court rejected the application and refused to issue letters of administration. An appeal was taken to the Supreme Court of this State, the applicant contending for the jurisdiction of that tribunal by reason of the amount of his alleged claim against the succession being $3800. The appeal was dismissed because of insufficiency in amount of value of succession; that the amount of a claim preferred in a contest for the administration of a succession is not the test of jurisdiction. In such controversies that question is to be determined by the value of the matter in dispute, the possession of which is sought, which in succession cases is the value of the assets, regardless of the liabilities. (Succession of Susan B. Thomas, No. 8699, Docket Sup. Ct.)

As the identical record now before us was before the Supreme Court, their opinion and decree will be respected in determining a question of fact, that the amount in dispute or fund to be distributed was not shown to them to exceed one thousand dollars.

The question, therefore, for this Court must be determined upon the assets or funds of the succession, which should be administered or distributed by an administrator.

The applicant, in his petition for letters of administration, mentions no amount of value; he simply alleges that decedent left some property and effects within the jurisdiction of the District Court of this Parish. There is no affirmative testimony that if she left anything in this State, it is worth one dollar or a thousand dollars. During the course of the examination of oppo-

nent E. T. Merrick, as a witness, he stated that he had owed Mrs. Thomas four hundred dollars, but that he did not now owe it, as it was prescribed.

It is perfectly immaterial in this connection, to determine the question of prescription, nor could we legally determine it; the matter is before us incidentally and in no real contest between proper parties; but if, as appellant contends, we must accept this statement of a former debt of $400, as giving us jurisdiction and fixing the existence of property within the Parish, we are unable to see how we can divide the statement as it is admittedly before us. There is no positive admission that this $400 is an asset of the succession, or that it has any existence as a claim, because at the very moment of the statement that one time there was a debt, comes the statement of its extinguishment, and there is no circumstance, or condition, that militates against the entire declaration; on the contrary, it stands exactly in the record as sworn to by the opponent, without contradiction or attempt at traverse.

Jurisdiction has been expressly conferred by law, and when litigants seek our forum they must make out an affirmative case and show, at least, that there is some definite sum or interest about which a controversy exists and upon which we can pass intelligently and finally.

There is no doubt that this fact of a claim or debt, due by E. T. Merrick, was never contemplated by applicant. It was a fact, as appears from argument and statements before us, that for the first time appeared to them, when stated by the witness, an adverse witness, during the course of an examination on other facts. This is evident from an affidavit filed by appellant at a late date before us, in which he states the amount of assets belonging to the succession is not less than $400, thereby implying more than $400; how much more than $400 we are not told. What we should know is, that the amount is in excess of $200 and not more than $1000.

Besides, the affidavit is not conclusive. We are not limited to its consideration alone, which is but a sworn allegation of one

of the parties. The amount should be legally ascertained from the pleadings and documents in the record. State ex rel., Police Jury vs. Miscar et al., 34 La. An. 834; Wilkins vs. Gault, 32 La. An. 929; Sentell vs. Demas, Sup. Ct., not reported.

The facts nowhere appear from the testimony considered by us which fix any sum or value to the assets left by decedent, giving us jurisdiction, and we cannot, therefore, review the judgment of the District Court.

Appeal dismissed.

No. 223.

JOS. MARTINEZ *v.* GEO FOUCHE *et al.*

1. Upon an appeal from a judgment disposing of a rule by an adjudicatee, at sheriff's sale, to secure a deed, all the documents, etc., in the record, are not to be considered by this Court; only those specially offered and accepted upon the trial of such rule can be noticed.
2. Where one claims title to property, by virtue of a sheriff's adjudication, to make out his case, he must exhibit in evidence the judgment, writ and sheriff's return.
3. The sheriff has authority only to adjudicate absolutely, or, in proper case, to decline to so do: he cannot make a conditional, or contingent adjudication.

Appeal from Civil District Court, Division D. Rightor, J.

R. H. Marr and *R. G. Harris* for plaintiff and appellee.

H. P. Dart and *Alfred Shaw* for defendant and appellant.

MCGLOIN, J.—Plaintiff having bid at a sale, under execution one hundred and five ($105) dollars for certain real property, proceeds, by rule, against the Civil Sheriff of this Parish, to compel that officer to execute to him a formal deed and place him in possession. It seems that the particular property in question, belonging to Geo. Fouche, is, and was at the time of the bidding, aforesaid, charged with a special mortgage executed by said Geo. Fouche, in favor of Mrs. Anna Oser, in a sum far exceeding the amount of the said bid. Said Mrs. Oser has been made by plaintiff a defendant in the rule, and she attacks the validity of the sale upon the grounds that there was no lawful bidding, inasmuch as

the sheriff's adjudication was not absolute but conditional, and inasmuch also as the sum bid was less than the amount of her prior special mortgage.

Upon examining the note of the evidence, tendered by plaintiff upon the trial of this rule, we find that he has failed to place before us either his judgment or the writ of *fieri facias*, issuing to enforce his said judgment, or the sheriff's return upon such writ.

This Court, as one strictly appellate, has no connection with, or cognizance over this cause, in anything but the particular rule that, after trial and adjudication below, has been brought up to it by the appeal. We can notice nothing that was not properly introduced upon the trial of the rule; and the mere fact that the judgment, execution and return are among the papers as a portion of the record, in those parts thereof antecedent to the origin and determination of this particular issue, does not introduce such documents to our notice. We, therefore, must determine the cause, excluding said documents from consideration.

It is almost elementary, that one appearing for the purpose of enforcing property rights, acquired under a sheriff's adjudication, must exhibit his judgment, writ and the return thereon; and applying this principle, we should be compelled to dismiss this rule.

Plaintiff, however, has offered the sheriff's answer to the rule, and he may consider himself entitled to rely upon the declarations thereof, not restricted by objection, as establishing the existence of his judgment and of the writ and adjudication thereunder.

Even if we should admit him to be entitled to such a ruling on our part, which we refrain from doing, we find that the sheriff's answer denies making a definitive adjudication, but declares that, when the bidding was completed, he considered that no adjudication should be made, by reason of the inadequacy of the sum offered; that finally he did *conditionally* adjudicate.

The exact language, in this connection, of the sheriff's answer is as follows: "That said mover was unable to furnish your respondent with any evidence establishing his rank and privilege,

as superior to said mortgage which is for the sum of four hundred and twenty-five dollars, and is held by Mrs. Oser, of New Orleans, and mover (?) therefore declined to make an absolute adjudication of said property, but adjudicated the same upon the condition that said plaintiff should establish his rights, rank and privilege contradictorily with the proper parties before the Court."

We should take this this answer, by reason of plaintiff's offer thereof, as a true statement of the facts; and we have no hesitation in saying that, if the recitations of this answer can stand for judgment, writ and return, they disclose a transaction utterly beyond the powers of the sheriff, and utterly null and void. The sheriff has no authority other than to adjudicate or refuse to adjudicate, according to circumstances. He can make no conditional adjudication, having no fixity of character whatever. The question about these conflicting mortgages or claims may have deterred bidders and caused a low price to be tendered. It would, under such circumstances, be unfair to the defendant and to Mrs. Oser to permit an adjudication to lie over in uncertainty, dependent upon the outcome of future litigation, in such manner that the bidder acquired, in fact, not the property absolutely, as the *hope of securing* it by means of a recourse to law.

The judgment appealed from made absolute the rule of plaintiff, and it is in our opinion erroneous. It is therefore reversed, and the rule of plaintiff is dismissed, plaintiff to pay all costs.

No. 207.

A. ESCUDÉ *v.* LACOSTE & LAPOUYADE.

1. This Court will follow the jurisprudence, as fixed and established by the Supreme Court of this State.
2. Where A endorses in blank a promissory note, drawn by B to the order of C, parol or other evidence, *aliunde*, is admissible to show actual intention—whether A signed as endorser, or surety.
3. Under the authorities in this State, in such a case, in the absence of explanatory evidence, the contract will be presumed one of surety.

4. Where, therefore, proof was not administered showing that a contract of endorsement was intended, A was held as surety; and failure to protest and notify did not release him.

Appeal from Civil District Court Division D. Rightor, J.

W. E. Murphy for plaintiff and appellee.

A. Voorhies for defendant and appellant.

McGLOIN J.—In this case, the question is, whether one, who has endorsed, in blank, a promissory note, that has been made payable to another, that other being the payee, is liable as a surety, joint maker or endorser. Escudé, the payee, is plaintiff herein, and Lacoste, one of the defendants, the drawer, while Lapouyade, the other defendant, has placed his name thereon, as stated. There has been no proof of demand, protest or notice, and Lapouyade, claiming to be merely an accommodation endorser, contends that he has been released from all liability, by reason of plaintiff's laches.

The doctrine seems firmly settled in this State, that where one, not party to a bill, places his name thereon, parol or other evidence *aliunde* may be admitted, in order to ascertain what was the real intention of the parties. And further, it is settled, also, that in the absence of proof the presumption is, that the contract of the party, so signing, is that of surety and not of an endorser, simple and pure, and that neither protest, nor notice thereof, is necessary in order to hold. Cooley vs. Lawrence, 4 Martin La. 639; Guidry vs. Vives, 3 Martin La. N. S. 659; Smith vs. Gorton, 10 La. 374; Hiram Gilbert et al. vs. Cooper, 4 Rob. La. 161; McGuire vs. Bosworth, 1 La. An. 248; Penny vs. Parham, 1 La. An. 274; McCausland vs. Lyons, 4 La. An. 273; Drew vs. Robinson, 2 La. An. 592; Chorn vs. Merrill & Bracken, 9 La. An. 533; Weaver vs. Marvell, 12 La. An. 518.

We have already declared that this Court will endeavor to follow the authority of the Supreme Court of this State, in all cases where a proposition of law has been entirely and finally determined by the decisions of that tribunal, and that new

departures in matters of interpretation will be left to that Court to inaugurate. Acting upon this principle, we must accept, in this case, the voice of the many authorities cited, and adjudge the contract of Lapouyade to be one of surety alone, and hold him not discharged by the failure to duly protest.

We reserve, however, in all cases the right, while applying the law, as interpreted by the Supreme Court, to express our differences in opinion, whenever such differences arise, from the principles laid down in any precedent or precedents so applied.

In this particular case, it must be, of course, conceded that an endorsement, such as that in question, is not, of itself, fully expressive or determinative of the intention of the parties at the time it was given and taken. Viewing simply the note and its signatures, it may be that Lapouyade intended to bind himself absolutely, and as if he were a joint maker; or to guarantee absolutely the debt; or to assume, towards the payee, only the restricted or conditional obligation of an endorser; or even that he contemplated and was solicited simply to accommodate the payee, who was to place his own endorsement as the first, before negotiating for his own account and benefit. In view of the fact, that such an endorsement, upon a negotiable instrument, leaves the mind in doubt between all of these interpretations, it is evident that the endorsement alone does not constitute such a certain and explicit contract, so as to prevent collateral or outside enquiry in order to ascertain the intent. To this extent, that is, the admissibility of evidence *aliunde* to solve such a doubt, the authorities seem generally agreed, at least in cases where only original parties are before the Court, as in this. See Daniels on Negotiable Instruments, Ed. 1879, vol. I, § 710, p. 562.

It is where there has been no evidence *aliunde*, that the Courts, compelled in some manner to dispose of all questions, have had to chose between the presumptions already enumerated, and the authorities upon the question are divided, so that some are to be found supportive of each of these theories of determination. The interpretation, which holds such endorser as a joint maker, has been adopted by the Supreme Court of the United States. Good

vs. Martin, 95 U. S. (5 Otto) 92. It also seems to have the sanction of the Courts in Vermont, Massachusetts, Delaware and other States. See Daniels on Negotiable Instruments, vol. I, § 713, note 1 to p. 565. So, that, *prima facie*, the liability of one, who so writes his name upon commercial paper, is as *second endorser*, the apparent payee being first, and liable to him as such, has been adopted in several cases. See Daniels, vol. I, p. 566, note 3. In our State, as already shown, it is settled that the contract is presumably one of surety, and this has also been determined in others of the States. See Daniels, p. 566, note 1.

In the first place, it would seem to us that, particularly under the law of this State, the interpretation which fixes liability upon Lapouyade as a simple surety, is not admissible, for in chosing among conclusions, as in this case, where there is no evidence to give us certainty (and where, if there was anything particular done or said beyond the execution and signing of the paper, it has not been shown), the Court is dealing with inferences alone. In other words, it is establishing a contract by presumptions. To make the idea still more clear, by means of variation of our statement, the Court, in absence of *expression*, is striving to ascertain what was *implied* by the acts alone of parties. This, however, it seems to us was not open for them to do, because Article 3039, La. C. Code, prohibits it.

"Suretyship cannot be presumed; it ought to be expressed, and is to be restrained within the limits intended by the contract."

But, passing beyond that Article, we must recognize the fact, that the *form* which parties have chosen to give the contract must have great weight in determining intention. Had Lapouyade, in this case been expected simply to secure the debt evidenced by the note sued upon, he could have so written, and the contract would have had the form familiar to the Courts, where simple surety is in question. But the parties in this case have not so shaped the contract, but they have thrown it into the shape of commercial paper, and the legitimate inference is, that the intention was to place the transaction under the sole government of the *lex mercatoria*. And this applies to all parties,

endorser, payee and maker. It was competent for Lapouyade in this case to have declared, expressly, that he was willing to hold himself upon this note, but only as an endorser, with the rights given by the commercial law to an endorser. This, if written over his signature, would protect him, even though he were not technically an endorser; that is, even though the title to the note was never intended to pass through him. This would be so, by reason of the liberty of contract; for men may grant, or reserve, whatever rights they please, provided the right granted or reserved is not criminal or contrary to public law or policy. The back of commercial paper is the place reserved by universal usage for endorsements, as the face and foot is that which is reserved for drawers. It seems to us, that the place where Lapouyade has placed his name indicates his intention to assume the character usually assumed by all whose names figure upon the back of such paper; and the fact that he has abstained from signing upon the face, and at the foot of the note, excludes the presumption that he intended to bind himself as maker, or to the same extent as a maker.

That the manner of placing his name upon the note precluded absolutely the idea that he was to figure as a real endorser, does not militate against the position that, by his act, he reserved the rights of an endorser, for he might have made this reservation, by expression, and what one can accomplish by expression, he may do, if the law forbid not, by implication. Nor is the inference an absolute one, that Lapouyade was not to stand in the line of title, for the intent may have been that Escudé was to endorse before him, either with or without recourse.

Nor is it, to our mind, an argument that Lapouyade gave to Escudé, the opportunity of writing above his (Lapouyade's) name, an unconditional guarantee. The force of this argument can only arise from the supposition that Lapouyade intended Escudé to do, what he put it in the power of the latter to perform. But, the force of this conclusion is destroyed by the fact, that no such guarantee has been written over the name, and since Escudé not has availed himself of this advantage, it is to

be inferred that it was not accorded to him to do so, and even further, perhaps, that he was forbidden so to do.

Were this cause, therefore, a new one, we would declare Lapouyade released, but we follow and apply the law as the same has been interpreted by the Supreme Court of this State.

Judgment affirmed.

CONCURRING OPINION.

ROGERS, J.—I have preferred to rest my concurrence upon the decisions rendered in this State on the questions involved and have not gone further in the investigation, and so am not prepared to either concur or differ with my colleague in the views expressed by him, in opposition to the soundness in principle of the precedents followed.

No. 407.

LOUIS WALD & Co. *v.* W. B. REEDY & Co.—THE HIBERNIA INSURANCE Co., Garnishees.

1. In an attachment suit, where garnishment process has issued, an order, taking interrogatories *pro confessis*, cannot become final against the garnishee, until there be an absolute judgment against the principal defendant.
2. Such an order, therefore, against a garnishee, rendered before the defendant has been finally condemned, is interlocutory only: nor can it work an irreparable injury—therefore, no appeal lies directly therefrom.

Appeal from Civil District Court, Division A. Tissot, J.

W. F. & D. C. Mellon for plaintiff, appellee.

T. Gilmore & Sons for garnishee, appellant.

ON MOTION TO DISMISS.

KELLY, J.—This is an attachment suit against non-residents, in which notice of seizure under the writ was served upon the Hibernia Insurance Company, and interrogatories were propounded to them as garnishees in the usual form. The Company having answered all of the interrogatories categorically in

the negative, a rule was taken by the plaintiffs upon the Company, to show cause why its answers should not be set aside as untrue, and the interrogatories be taken for confessed, which upon trial was made absolute; and the answers of the garnishees were ordered to be set aside as untrue, and the interrogatories propounded by the plaintiffs to the garnishees to be taken for confessed; and from this judgment or order the Hibernia Insurance Company has taken this appeal.

Motion is now made, on behalf of the plaintiffs and appellees, to dismiss the appeal, because, first, the appeal is premature, it being from an interlocutory judgment, that does not and cannot work irreparable injury to the garnishee, and, second, because there is no final judgment against the garnishee.

On behalf of the appellant it is contended that the judgment appealed from is not an interlocutory judgment, but one disposing of all the issues between the parties, plaintiff and garnishee. But such is, obviously, not its character. The *main* issue between the plaintiffs and the garnishee, to which all other issues are merely subsidiary, is, as to whether or not the plaintiffs shall, eventually, have and recover of the garnishee the amount of their claim against the defendant; and the judgment appealed from certainly does not dispose of that issue, as, under it, without a *further judgment*, the plaintiffs can have and recover nothing of the garnishee.

Although called a judgment, the decree appealed from is merely an interlocutory and preliminary order, which can, in no wise, avail the plaintiffs unless supplemented by a further and final judgment in the suit. Nor is it an interlocutory judgment, which, if it be erroneous, can work any injury to the party against whom it is rendered, not remediable by appeal from any final judgment which may be based and predicated upon it.

In State ex rel. Schooler vs. Judge, 23 An. 214, the plaintiff traversed the answers of the garnishee, and, after regular trial, the rule was made absolute, taking the interrogatories for confessed; and it was ordered that such property and effects of the debtor as were in the hands of the garnishee, as well as such

sum as was due by him to the debtor, be subject to satisfy such judgment as might be rendered against the defendant. The proceeding was by *mandamus*, to compel the Judge of the District Court to grant an appeal from that judgment, and, as his return to the writ, the respondent showed that the judgment, so-called, was "a conditional interlocutory order, and not a final judgment and, therefore, not appealable until there be a judgment against the defendant, on the debt claimed by the plaintiff." And this return the Supreme Court held to be sufficient; and in so doing conformed to the jurisprudence of that Court, as to the character of such interlocutory orders, as settled by a series of antecedent decisions.

In Caldwell vs. Townsend, 5 La. An. 308, it was said: "The garnishee is only responsible to the plaintiff in attachment *through the claim which he has enforced to judgment against the defendant* in the cause; and no such judgment appears in the record in this case."

In Collins vs. Friend, Teatman, garnishee, 21 La. An. 8, the Court said: "In no case can judgment be had against a garnishee before a judgment is obtained against a debtor. 5 N. S. 307; 12 L. 16; 10 R. 138; 14 An. 374."

Of course, it was not meant to be said or intimated that no interlocutory order taking interrogatories for confessed could be had against a garnishee until after judgment against the debtor.

In Proseous vs. Mann, 12 L. 16, the Court said: "It is true Art. 263 C. P. provides that if the garnishee does not answer the interrogatories within the delay of the law, such refusal or neglect shall be considered as a confession of his having in his hands sufficient property of defendant to satisfy the plaintiff's demands.

"But it is clear plaintiff *cannot recover* against the garnishee without obtaining judgment against his debtor." In this case, an interlocutory judgment that the interrogatories be taken for confessed, was *set aside* on application of the garnishee to be permitted to answer, on the ground that there could be no final

judgment against the garnishee until there was judgment against the debtor.

In Rose and McCarthy vs. Whalley and Edwards, 14 La. An. 374, a similar interlocutory order taking interrogatories for confessed was vacated, and the garnishee allowed to answer. The Court said, in reference to the judgment set aside as interlocutory: "No judgment was rendered against the garnishee *for any sum of money.* * * Until the creditor has judgment against his debtor, he cannot have judgment against the garnishee, *for the latter is not indebted to the creditor but to his debtor.*

"The mere order of court taking interrogatories for confessed, before a judgment has been obtained against his debtor, cannot then *absolutely* benefit him, and it is not an order which he can at all events enforce against the garnishee, for if the creditor does not obtain judgment against the defendant, the order taking the interrogatories for confessed will not profit him.

"As then the creditor cannot get judgment against the garnishee, until he has obtained it against his debtor, the object of the law in forcing him to answer within a certain time will be effected if he answer at any time before judgment be rendered against the debtor."

The interlocutory order from which this appeal is not susceptible of any enforcement to the detriment of the appellant unless as it may be hereafter made the basis of a further and final judgment, an appeal from which will bring up for review, in due time, any question there may be of error *vel non* in the interlocutory order, from which the present appeal is premature, and must on that ground be dismissed.

And it is so ordered.

No. 343.

MOSES LOEB & CO. vs. GODCHAUX & SILBERNAGEL.

1. Where one creditor of a particular debtor sues another creditor of the same debtor, alleging that the former possessed himself unlawfully, and *against the debtor's protest*, of the goods of said debtor, rendering it impossible for the latter to pay the suing creditor's claim, held:

a. Such an action is not in the nature of a revocatory action.

b. Even if such a demand could be viewed as revocatory, it could not lie without an allegation of the liquidation by preceding judgment of the complaining creditor's debt, or without making such debtor party to the instant suit, for the purpose of such liquidating.

c. Until a debtor is put into insolvency, he controls his own property; the cause of action, therefore, upon the facts stated, resides solely in the debtor, directly injured, and not in any of the remaining creditors.

d. The proposition last stated applies, even where the complaining creditor alleges that the wrong-doer has thus possessed himself of the very property which formed the consideration of the debt, which such complainant is seeking to enforce.

e. The only remedy of a complaining creditor, in the case last supposed, would be to enforce his vendor's privilege, if existing, and in an action to which the debtor was made party.

2. No cause of action is vested in any one particular creditor.
3. Where A, contemplating selling to B, applies to C for information as to the solvency of said B, and C answered "he was good and honest;" such answer does not make of C a guarantor of the debt resulting.
4. No one can be compelled to respond, when applied to for information of this kind; but if he does speak, he must do so honestly. He is not, however, held to extraordinary care or diligence in the matter of investigating, or in the explanation of his meaning.
5. It is, in such case, only necessary that he should speak honestly; he can be held only for fraud in the giving of his answers, and not for mere errors of judgment.

Appeal from Civil District Court, Division D. Rightor, J.

E. E. Moise for plaintiffs, appellees.

Bernard Titche and G. L. Hall for defendants, appellants.

KELLY, J.—The material facts averred in the petition of the plaintiffs in this action are, in substance, that they are wholesale merchants of this City; that on or about the 6th of October, 1883, F. N. Wharton, a retail dealer of this City, in goods of the kind in which plaintiffs are wholesale dealers, applied to them to buy goods and became their customer; that, not knowing him, they applied to the firm of Godchaux & Silbernagel, of this City, for information touching his integrity and financial ability, and were told by them "that he was good and honest," "meaning," says the petition, "that he would act with mercantile honor towards petitioners and was able to pay for what

he purchased;" that, acting on the said representation of Godchaux & Silbernagel, they sold and delivered to said Wharton goods and merchandise, described in bills annexed to the petition, of the value of $165.77; that when said representations were made by Godchaux & Silbernagel, the said Wharton was indebted to them in the sum of $1200, which fact was unknown to petitioners, and that information thereof was withheld by the said firm.

That, thereafter, in January, 1884, "the said Godchaux & Silbernagel went to the store of said Wharton, themselves or by their clerks, agents, or employés, and took therefrom without judicial proceedings and *against the protest of said Wharton*, all of the goods, wares and merchandise in said store, including the goods sold by petitioners to said Wharton, as aforesaid, and which, to the value of $165.77, was at that time and still remains due, owing and unpaid, notwithstanding amicable demand on said Wharton; that said Godchaux & Silbernagel sold the said goods and appropriated the proceeds to their own use, including the goods *sold by petitioners to said Wharton*, which were and are still unpaid for, and that said Wharton is now and was, owing to the conduct of said Godchaux & Silbernagel, insolvent,"—by reason of which alleged facts, the petition claims that the firm of Godchaux & Silbernagel are responsible to the petitioners for the value of the goods sold by them to Wharton, and the relief prayed for is a money judgment in their favor against Godchaux & Silbernagel, for the amount of the bills of goods sold to Wharton, to-wit., one hundred and sixty-five dollars and seventy cents, and costs. Wharton was not made a party to the suit.

To this petition, Godchaux & Silbernagel excepted, on the ground that it disclosed no cause of action against them; which exception, after having been referred to the merits, was overruled in the Court below, and judgment rendered in favor of plaintiffs and against defendants for the sum of seventy dollars, interest and costs.

From this judgment the defendants have appealed and have

assigned here as error, apparent on the face of the record, the overruling of their exception of no cause of action.

The petition certainly does not state any cause of action of a *revocatory* character. It does not allege or ask for the setting aside of any fraudulent *contract* whereby property of their debtor, Wharton, was fraudulently or illegally transferred by him to Godchaux & Silbernagel; the averment is, that the property of Wharton, including that sold to him by petitioners, was taken possession of by Godchaux & Silbernagel, and sold, and the proceeds applied to their own uses, without judicial process *and against the protest of Wharton;* the averment is of a taking and conversion of the property of Wharton against his will, and tortious, as to him. Furthermore, if the action could possibly be considered as of the revocatory class, the petition—in that it neither avers that the claim against Wharton is liquidated by judgment nor seeks to have it liquidated by judgment *against him* in this action, to which he is not made a party,—would be fatally defective.

Nor can the petition be considered as sufficiently stating a cause of action, entitling the petitioners to recover the amount of the debt alleged to be due them by Wharton, from Godchaux & Silbernagel, as sureties or guarantors of Wharton. Even an express promise to pay, or to be liable for the debt of another,—and no such promise is alleged by Godchaux & Silbernagel to the plaintiffs, to pay or be liable for the debt of Wharton,—will not support an action unless the alleged promise be in writing, signed by the party to be charged, or by his agent or attorney in fact thereto duly authorized in writing, of which there is no pretence in the present case.

Nor does the petition state that the goods were sold to Wharton, upon the credit of Godchaux & Silbernagel, nor upon any other representation by them to plaintiffs than the statement made in answer to plaintiffs' inquiry, that, in their opinion, Wharton was "good and honest;" a statement which does not necessarily bear the meaning imputed to it in the petition, and which, if it did bear that meaning, would not make the defendants liable to

the plaintiffs, as sureties or guarantors of the debt thereafter contracted by Wharton. Nor does the fact that the defendants, not being asked (for it is not averred that they were), did not volunteer to inform the plaintiffs that they, themselves, had given credit to Wharton, in his business, to the amount of twelve hundred dollars, tend in any way to render them liable for the credit of one hundred and sixty-five dollars and seventy-seven cents thereafter given to Wharton by the plaintiffs. The fact that the defendants had themselves trusted Wharton to so large an extent, of itself shows, by their action, that they considered him good and honest, as the petition alleges they represented him to the plaintiffs to be.

The goods which were sold by the plaintiffs to Wharton, though sold on credit, became the goods of Wharton, from the time of the sale, subject in his hands to the vendor's privilege in favor of the plaintiffs. The petition avers that the goods were, without judicial process and against the protest of Wharton, taken possession of and sold and the proceeds converted to their own use by Godchaux & Silbernagel. Taking these averments, for the purposes of the exception, to be true, they do not state a cause of action entitling the plaintiffs to recover of the defendants, either the goods sold and delivered to Wharton, or the proceeds or the value of those goods. Whatever right of action could arise from the alleged tortious taking and conversion of the goods of Wharton would be in Wharton, and not in the vendors of the goods to Wharton. To any action by such vendors to enforce, against the property sold or its proceeds alleged to have passed into the possession of third persons, a vendor's lien and privilege to secure the debt alleged to be due by Wharton to the vendors for the price of the goods, Wharton would be an indispensable party; and he is not made a party by the petition excepted to.

In no aspect of the case stated by the petition does there appear to be any legal ground to entitle the plaintiffs to the recovery prayed for, or to any recovery of the defendants; and it is therefore considered that the judgment appealed from is erro-

neous, in overruling the exception of no cause of action, and consequently erroneous in all other respects.

Wherefore, it is ordered, adjudged and decreed that the judgment appealed from herein be reversed and avoided, and that there be judgment here in favor of the defendants and appellants, Godchaux & Silbernagel, and against the plaintiffs and appellees, Moses Loeb & Co., that the exception of no cause of action be maintained and the suit be dismissed; and that the plaintiffs and appellees be condemned to pay all costs of both Courts.

ON APPLICATION FOR REHEARING.

McGLOIN, J.—Plaintiffs' petition presents a double cause of action. In the first place, they seek judgment upon the allegation that one Wharton applied to said petitioners to "buy goods of them and become their customer; that not knowing Wharton, they applied to the firm of Godchaux & Silbernagel * * for information touching the integrity and financial ability of said Wharton to pay for the goods he might purchase and were told by said firm that he was honest and good—meaning that he would act with mercantile honor towards petitioners and was able to pay for what he purchased; * * that acting on the representations of said Godchaux & Silbernagel, they sold and delivered to said Wharton goods and merchandise; * * that at the time the said representations were made by said Godchaux & Silbernagel, the said Wharton was indebted to them in the sum of $1200, which was unknown by petitioners and information thereof withheld by said firm," etc.

We do not pretend to declare that a party is not liable who, when applied to for information as to the standing and integrity of another, knowing that this application is for the purpose of determining whether credit shall be given or not by the applicant, gives wilfully and with fraudulent intent, a false and deceiving response, upon the faith of which the enquirer acts to his prejudice.

No one can be compelled to express any opinion when thus applied to, but if he does undertake to speak, he should do so honestly. But even where the party interrogated undertakes to answer, he is not to be held in any way for error in judgment or opinion, provided only he has spoken what he truly thought or considered at the moment. Nor is he, in general, bound to extraordinary care or diligence in the matter for the purpose of investigating, or of elaborate explanation. The imposition of responsibility for error, in cases such as this, no matter whether in good faith or not, would be to make parties suffer unreasonably who were seeking only to render a charitable service.

The very foundation of such an action, therefore, is fraud upon the part of the person who has given the information acted upon. Therefore it is that the cases relied upon by the learned counsel for plaintiffs all speak of "fraudulent misrepresentations," or "fraudulent suppressions of the truth."

Now fraud is never presumed, and if it is to be proven, it must be alleged. Where a party omits to charge his opponent specifically with fraud, there is a tacit admission of good faith. We look in vain for any allegation in this petition charging that the defendants in this case acted with fraudulent intent when they responded to the inquiries addressed to them concerning the solvency, etc., of Wharton. On the contrary, it is particularly alleged in another portion of this petition, that the insolvency of Wharton was occasioned by subsequent actions of the defendants, which actions we are hereafter to consider. This allegation is, after reciting said acts, that "said Wharton is now and was, *owing to the conduct of said Godchaux & Silbernagel*, insolvent," etc.

Now, to allege that Wharton was rendered insolvent by subsequent events is to allege that he was in fact solvent at the time of the inquiry and response which are made the basis of the first complaint.

So it is alleged that the wrong which is complained of against defendants in this case, as being the cause of Wharton's insolvency, was accomplished "against the protest of said

Wharton." Surely this is an intimation that Wharton did not participate in this alleged wrong, or acquiesce in any way therein at the moment of its execution, or in other words, that he acted with fairness and honesty, at least, at the moment when his goods were being taken away.

We perceive, therefore, that not only does this petition not charge fraud against defendants, in their response to the inquiry of plaintiffs as to the standing, etc., of Wharton, but it practically justifies an inference in favor of the truth of what was then declared, that is, that Wharton was solvent and honest.

With regard to the second portion of this complaint, it is alleged that after plaintiffs had sold to Wharton a certain bill of goods amounting to $165.77 in value, "Godchaux & Silbernagel went to the store of said Wharton, themselves or by their clerks, agents or employees, and took therefrom, without judicial authority and against the protest of said Wharton, all the goods, wares and merchandise, in said store of Wharton's contained, including the goods sold by petitioners to said Wharton, as aforesaid, and which, to a value of $165.77, was at that (time?) and still remains due and owing and unpaid, notwithstanding amicable demand on said Wharton—that Godchaux & Silbernagel sold the said goods and appropriated the proceeds to their own use, including the goods sold by petitioners to said Wharton, which were and are still unpaid for—and that said Wharton is now and was, owing to the conduct of said Godchaux & Silbernagel, insolvent, and that the conduct of said Godchaux & Silbernagel is and was contrary to good conscience and mercantile honor and law, and they are responsible to petitioners for the full amount of the debt due by said Wharton to petitioners and the proceeds of the goods sold by petitioners to said Wharton and appropriated by said Godchaux & Silbernagel to their own use, being $165.77."

In this part of the petition we find it complained of simply that defendants appropriated these goods "without judicial proceedings and against the protest of said Wharton." Now it does not follow from this allegation that they were acting entirely

without right or without title of any kind, even such as would give rise only to a right to sue in revocation. It may be, so far as the petition is concerned, that defendants were authorized by Wharton to act as they did, and that they were carrying out the terms of their agreement, having no need to resort to judicial process. Nor does the allegation that Wharton protested at the moment of execution exclude the idea that he had not already and upon some previous date accorded this right.

In other words, where a party takes property, as in this case, his act is not unlawful simply because it is done without judicial process, or against the protest of owner, and for no other reason. The plaintiffs in this case should have alleged, in any event, that the conduct of Godchaux & Silbernagel was absolutely without right of any kind.

Nor can the general expression, found towards the close of the petition, that the conduct complained of "is and was contrary to good conscience and mercantile honor and law," in any way cure the defect pointed out. This language is a mere expression of opinion upon the part of the pleader, leaving untouched the fact that the complaint is against defendants for taking the property "without judicial proceedings and against the protest of said Wharton." In the pleader's opinion, this may be enough to constitute a showing of bad faith, etc., but the showing remains *per se* the same, despite this expression of opinion.

But we go further, and maintain that even were it clearly and unmistakably alleged that Godchaux & Silbernagel were at fault for more reasons than simply that they did not resort to judicial process, and that they ignored the protest of Wharton, yet would there be no cause of action.

Except where the law especially provides to the contrary, every man is master of his own affairs, and must enforce his own rights. If it be true that Godchaux & Silbernagel, by illegally appropriating the property of Wharton, caused his failure, the Courts are open to Wharton to seek his remedy. Whatever has been wrongfully or fraudulently done, he has the power to redress by legal proceeding. No creditor has the right to step over the

debtor in such a case, and attack the one that has wronged him. The remedy accorded by law to the creditor is to sue the debtor, and, judgment obtained, to subject this claim for redress to the satisfaction of his writ. To recognize the right of the individual creditors of Wharton to institute such a suit as this, might be to compel defendants to litigate with several creditors instead of with Wharton, with whom alone they had dealt; would be to deprive Wharton of dominion over his own property and assets, without any adjudication against him in bankruptcy proceedings, or insolvency.

It will be observed that this case, as disclosed in the petition, is very different from one in which a third person fraudulently participates *with the debtor* in concealing or making way with property which is mortgaged or affected in any way in favor of some creditor. In such a case, the malice is directed particularly by both offenders against the creditor himself, and the wrong, likewise, is particularly directed against him. So the fact is, that the *debtor is doing a wrong*, and the third person, by making himself an accomplice of that wrong, becomes liable also and *in solido*, under the provisions of Art. 2324 of the Civil Code.

Rehearing refused.

No. 355.

F. CASPAR & Co. *v.* MRS. M. D. STONE, EXECUTRIX.

1. Under La. C. C. Art. 2695, the lessor is responsible to the lessee for damages occasioned by a vice or defect of the thing leased, whether existing at the time of the execution of the lease, or arising since; and, whether known to the lessor at the time of entering upon the contract, or not—provided only they did not arise from the fault of the lessee.
2. The judgment, however, in such case, in favor of the lessee, should be for no more than bare indemnity, for actual loss.

Appeal from Civil District Court, Division E. Monroe, J.

E. E. Moise for plaintiff and appellee.

Bayne & Denegre for defendant and appellant.

KELLY, J.—This is an action, by a lessee against a lessor, to recover, under Art. 2695 of the Civil Code, indemnity for losses alleged to have resulted from damage to certain dry goods of the lessee, occasioned by leakage of rain water from the roof of the leased building.

The text of the Article of the Code is as follows: "The lessor guarantees the lessee against all the vices and defects of the thing which may prevent its being used, even in case it should appear he knew nothing of the existence of such vices and defects at the time the lease was made, and even if they have arisen since, provided they did not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same."

There is in the Code Napoleon an Art. 1721, in the following terms:

"Il est dû garantie au preneur pour tous les vices ou défauts de la chose louée qui en empêche l'usage, quand même le bailleur ne les aurait pas connu lors du bail.

"S'il résulte des vices ou défauts quelque perte pour le preneur, le bailleur est tenu de l'indemniser."

The French Courts have held that, under this Article: "Des dommages interêts peuvent être accordés au preneur à raison de la perte qui résulte pour lui des vices ou défauts de la chose louée, *sans destruction du cas ou les vices étaient connus du bailleur et celui ou il les ignorait.*" Sirey, Code Ann. par Gilbert, Art. 1721, No. 3.

Contrary to this view, which is likewise that of Delvincourt, t. 3, p. 191, Marcadé, and others of the French Commentators, are of opinion that the expression "quand même le bailleur ne les aurait pas connu lors du bail," in the first of the two distinct clauses into which the legislator saw proper to divide the Article of the French Code, ought not to be considered to apply to or extend the operation of the terms of the second clause, in which the legislator did not embody any such expression; and upon this

theory of interpretation, it is contended that, by analogy to the liability of the vendor, in the contract of sale, the liability of the lessor, mentioned in the second clause of the Article, should not be construed to extend to losses resulting from vices or defects of the thing leased which were not known to the lessor at the time of the lease. *Vide* Marcadé, vol. 6, p. 447.

Whatever degree of plausibility this theory of interpretation of the Article of the French Code may possess, it can have no proper application to the interpretation of Art. 2695 of the Civil Code of Louisiana. The text of this Article is unambiguous, the expression "even if he knew nothing of the existence of such vices or defects at the time the lease was made," is so intimately connected, in the structure of the sentence, with the expression "and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same," that the two cannot be disconnected in meaning except by violent dislocation and dismemberment of the correlative parts of the sentence which the Courts should interpret in its integrity.

That Art. 2695 C. C. was not intended to be a mere literal and servile copy of Art. 1721 of the French Code, but was designed to differ from it, in material particulars, is evident from the fact, that the Article of our Code expressly provides that the lessor shall be liable to the lessee for losses resulting from the vices or defects of the thing leased, not only in case it should appear that he knew nothing of the existence of such vices or defects at the time the lease was made, but "*even if they have arisen since, provided they do not arise from the fault of the lessee;*" while the Article of the French Code is entirely silent as to any liability of the lessor for losses resulting from vices or defects of the thing arising after the execution of the lease. It is quite obvious that the measure of the liability of the lessor, as established by Art. 2695 of the Civil Code of Louisiana, was intended to be larger and more comprehensive than that established by Art. 1721 of the Code Napoleon.

The doctrine of our law is clearly and accurately stated in

Perret vs. Dupré, 2 Rob. 54: "The lessor is bound to indemnify the lessee for all damages sustained by the latter in consequence of the vices and defects of the thing leased, even if he knew not of the existence of such vices and defects at the time the lease was made and even when they have arisen since."

Upon consideration of all the authorities referred to in argument and examination of all the evidence in the record, we concur in the views expressed and the conclusion reached by the learned Judge *a quo*, as set forth in his written opinion, except as to the amount for which the plaintiffs are entitled to judgment. We concur in the view that they are entitled to recover only a bare indemnity for their actual loss; but, *that* the judgment does not appear to accord to them. The proof is that the original cost to plaintiffs of the goods mentioned in the list annexed to the original petition was $304.25, and the original cost of the goods mentioned in the list annexed to the supplemental petition was $715.66, making a total of $1019.91. The proof is further, that the goods were sold in their damaged state for all they would bring, and that this amounted to the sum of $212.95, which amount, deducted from $1019.91, the original cost of the goods, shows an actual loss of $806.96, for which we consider the plaintiffs entitled to judgment.

It is therefore ordered, adjudged and decreed, that the judgment appealed from herein be amended by increasing the amount thereof in favor of the plaintiffs, F. Caspar & Co., and against the defendant, Mrs. M. D. Stone, Executrix of Dr. Warren Stone, deceased, from the sum of six hundred and seventy-nine dollars and ninety-four cents to the sum of eight hundred and six dollars and ninety-six cents, with legal interest thereon from judicial demand, and cost, and that as so amended the said judgment be affirmed, the appellant to pay the costs of the appeal.

No. 242.

SUCCESSION OF THEOPHILE GOLLAIN AND WIFE.

1. Where the same individual is administrator of a succession, and tutor of the minors interested therein, he is bound, by his obligation as tutor, to accord to such minors, in the succession, the rights and the rank to which they are entitled.
2. In a concursus, between conflicting creditors, over the account of administration, in such a case, the minors are not lawfully represented by the administrator and tutor; and the judgment, under such circumstances, is not binding upon the minors, in favor of the said tutor.
3. In a proceeding, upon the part of such minors, against such tutor, the judgment upon his account as administrator, as above recited, fixing rank among privileged creditors to the detriment of the minors' homestead, and his disbursements accordingly, will afford no protection to the tutor.

Appeal from Civil District Court, Division A. Tissot, J.

James Timony for the opponents, appellees.

Simeon Belden for the tutor, appellant.

ROGERS, J.—The minor children of Theophile Gollain and his wife oppose the account filed by their tutor. The succession was insolvent, and the tutor obtained $1000 for his wards, awarded by law to minors in necessitous circumstances. He claims also to have paid out various sums for board and other charges. We have not found in the record any receipts for the payments claimed or the judgments referred to. The tutor in this instance was also administrator of the succession. As tutor he was bound to see that the rank of claim and rights of the minors were protected as against all claims against him as administrator—a judgment against him in the latter position was not binding upon the minors—they should have been properly represented in the curcurso of creditors invoked by the acts of administration, and their privilege and claims contradictorily established. As administrator he cannot be shielded from his dereliction as tutor, because, in a proceeding in which the minors were not represented, the privileges of creditors were fixed.

The privilege accorded the minor and surviving widow in ne-

cessitous circumstances is of the highest rank. "It shall be paid in *preference to all other debts*, except those for vendor's privilege and expenses incurred in selling the property." Rev. Stat., Sec. 1693.

As a matter of fact, the lower Judge found, and so expressly ordered in his decree, that the tutor had received the one thousand dollars for the minors, and adjudged in favor of Hortense Gollain, wife of Otto Krege, $475.25, and in favor of Alphonse Gollain, $324.75. The judgment is therefore affirmed.

No. 445.

JULES VAUDRY *v.* THE N. O. COTTON EXCHANGE.

1. The rights of stockholders spring from the contract of incorporation; certificates of stock do not create, or directly preserve such rights, they are mere formal evidences thereof.
2. Where a stockholder, deprived unlawfully of his stock, or shares, in a corporation, sues that corporation for the stock or its value, neither the prescriptions of three, five nor ten years apply.
3. A member, or shareholder, in any company cannot be "dropped from the roll," except in the cases and manner provided in the charter. Any "dropping from the roll," except as thus provided, is null and void, and in nowise affects the rights of the stockholder.
4. Where, in the organization of the New Orleans Cotton Exchange, provision was made for stock which might be held and owned by one not enjoying the right of admission to the Exchange, or privileges of the floor; and it was provided, also, that stockholders, by paying certain dues, should enjoy such privileges,—*held*, that failure to pay such dues, while it may affect such particular privileges, cannot affect the rights of the members as mere stockholders.
5. In the organization of said New Orleans Cotton Exchange, those who paid the original initiation fee of fifty dollars became full shareholders; and their rights were not taken away, nor their obligation added to, by the subsequent changes effected in the charter.
6. Estoppel is a defence which must be specially pleaded.
7. The plea of estoppel is not established by merely showing a delay in the enforcement of rights, too short for prescription.
8. Stockholders may rely upon the honesty of their associates, and of the officers of the corporation, that the fundamental laws will be observed; therefore, their rights are not to be prejudiced, as by estoppel, by reason alone of mere failure to inquire into, or interfere in its affairs.

9. To establish estoppel by acquiescence, it must be shown, affirmatively, that the party affected had knowledge of the facts.
10. Where a party has been unlawfully deprived of shares of stock in any corporation, he can recover, by way of damages, the full value of such stock.

Appeal from Civil District Court, Division C. Monroe, J.

Chas. S. Rice for plaintiff and appellant.

Bayne & Denegre for defendant and appellee.

McGLOIN, J.—In 1871, certain parties, plaintiff among them, formed an association, designated as the "New Orleans Cotton Exchange." By the constitution, an initiation fee of fifty dollars was to be paid: no other provisions being made for other exactions. This initiation fee plaintiff duly paid.

Later in the same year, these parties appeared before a notary and executed a formal charter, by notarial act; by which instrument the association was formed into a joint stock company with a capital stock of $10,000, in two hundred shares of fifty dollars each. Jules Vaudry was a signer, he had paid his fifty dollars; hence, was a stockholder from that date.

It matters not that no certificates of stock were ever issued under this charter; for rights of this character spring from the contract; and the certificates are mere formal evidences of those rights. Morawetz on Private Corporations, § 258.

In 1872, there were amendments, whereby the initiation fee was fixed at one hundred dollars; but it is not contended that this provision affected plaintiff, or was intended to have a retroactive effect upon any who were already members.

In 1873, came further amendments, whereby the capital stock was fixed at one hundred thousand dollars, in one thousand shares of one hundred dollars each. One article of these amendments expressly declared members who had already paid the "regular initiation fee," "entitled to receive one share of the capital stock in return therefor."

If, in the meantime, Vaudry had not lost or surrendered his membership, his share of fifty dollars became one of one hun-

dred; and, for the reasons already stated, this advantage came to him, independent of the taking of any certificate.

During 1876, other amendments were adopted in which it was provided that, for the future, the initiation fees received should enure to the benefit of the association, and no share of stock should be given for them; but it was stipulated, again, that those who had already paid an initiation fee were still entitled to a share of stock by virtue thereof.

In 1880, Article III of the charter was amended, and the capital of one hundred thousand dollars was made to consist of only five hundred shares, instead of one thousand; the new shares being each for two hundred dollars. Owners of old shares were entitled to exchange them, without additional payment, for new; and the corporation was empowered to sell all shares undisposed of, at prices not less than two hundred dollars per share.

It follows that plaintiff now, if still lawfully in the association, became a stockholder for one share, at face value of two hundred dollars.

It is admitted that in April, 1884, plaintiff demanded a certificate for his stock; which certificate was not issued to him. He now sues for the value of the stock, at the date of his demand; and it is shown that, at the time in question, the stock was worth more than the sum demanded.

Defendant pleads prescription of three, five and ten years; but, if the case be as plaintiff presents it, such a plea cannot avail. Fairex vs. Railroad Company, 36 La. An. 62.

A further defence is, that in 1872 plaintiff was "dropped from the rolls," for non-payment of annual subscription, or dues; hence, that he was not a "member" in 1873, when the amendment fixing capital stock at one hundred thousand dollars, and shares at one hundred dollars each was passed.

We find no showing of authority or right for the alleged "dropping from the roll," so far, at least, as such "dropping" is advanced as a bar to the plaintiff's action in this case.

In the original articles of association was ample provision for expulsions and suspensions. These could only be imposed,

upon formal charge, accompanied by due notice, and an opportunity of hearing—and, after all, only by vote of the Board of Directors, two-thirds or more of those present voting in the affirmative. Similar provisions are to be found in the formal charter of 1871. In face of these fundamental laws, the informal "dropping from the roll," so far as constituting an expulsion, or absolute deprivation of rights, against Vaudry is concerned, was an absolute nullity.

Moreover, Art. VII of the charter of 1871, provides this penalty for non-payment of the annual subscription: "no member shall be entitled *to admission to this Exchange*, whose dues are not paid by the 25th of November, and *such exclusion shall continue until all dues are paid.*"

If by "dropping from the roll" is meant that plaintiff's name was stricken from the list of those having the privileges of the floor, such action may have been valid; but, to the extent contended for by defendant, that is, entire expulsion, with loss of all rights, it can have no effect.

It is contended by defendant that the right to receive new stock depended upon the fact that the party applying had paid up all dues and subscriptions; but there is no warrant for this in the written charters submitted to the Court. These charters impose no condition, in this connection, other than payment of initiation fee; and we cannot presume that a condition, excluded from the acts themselves, was intended to be of force. Nor can a court go beyond the expression of such written acts, to find stipulations which are not therein embraced by clear implication.

Moreover, it seems very evident that a distinction has been made to exist between the mere stockholding in this association, and membership. In the instrument executed in 1873, we find Article V imposing as a condition precedent to membership, the ownership of one "or more" shares of stock. On the other hand, by Article VI it is provided that: "the ownership of one or more shares of the capital stock of this association shall not confer upon the holder thereof any of the rights or privileges of membership."

So, the evidence shows that, as a fact, this stock is quoted upon the markets; and that many shares are held by persons who pay no dues.

There is in this case no plea of estoppel, and it has been decided by the Supreme Court that estoppel must be specially pleaded. Heirs of Wood vs. Nicholls, 33 La. An. 748

But were the absence of any formal plea overlooked, yet, from the facts, we can see no estoppel.

We have in this State specific laws of prescription; the object of which laws are to bar rights which have been permitted to slumber during an undue length of time. Mere delay, therefore, does not of itself defeat the assertion of rights, so long as the term fixed by Statute, for the prescription of such rights, is not accomplished. One interested as a stockholder in any corporation is not compelled, at peril of his rights, to show himself from time to time to the officers of his company; nor can he be prejudiced by mere abstention from inquiry, or from active interference in its affairs. He is presumed to know his charter, and has a right to suppose the same known to the officers and to his fellow shareholders; and he can, if he so wishes, rest during twelve years, as well as during twelve months, upon the hope and trust that the fundamental laws of his company will be respected and obeyed. It were a dangerous, as well as an unjust doctrine, to hold that mere silence on the part of shareholders amounts to acquiescence in the unlawful actions of those in charge of corporations. In these days, certificates of stock travel far, and they are often held in the same corporation by parties scattered over very wide territorial areas. Under such a doctrine, these scattered shareholders would many of them be entirely at the mercy of those who happen to be in active management of the affairs of their corporations.

Finally, there is no evidence whatever against the plaintiff in this case, that before his demand, he was aware of the fact that the defendant corporation had seen fit to erase his name from the list of shareholders, and to dispose of his share as if it belonged to the Exchange. Estoppel by acquiescence cannot be

founded alone upon the act or non-action of a party; but to have this effect, it is essential that the action, or non-action, be with knowledge of the facts. Bigelow on Estoppel (Ed. 1872), pages 538, 531; Spencer vs. Carr, 45 N. Y. 406; Brewer vs. Boston and W. R. Co., 5 Met. 478; Watkins vs. Cawthorne, 33 La. An. 1198.

In this case, it is shown that Vaudry left the City of New Orleans about the time of his alleged "dropping from the roll;" and there is nothing whatever to show that, before the sale of his share, or at any time previous to his demand in 1884, he was notified of this action.

Proof is made that this share of stock, which should belong to Vaudry, is no longer in the control of defendant; said defendant having disposed of it, with others. We consider it clear that plaintiff can recover its value. Woodhouse vs. Crescent Mutual Ins. Co., 35 La. An. 238.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be set aside and reversed; and that plaintiff do now recover of the defendant eight hundred and fifty dollars, with interest, as prayed for, and all costs.

CONCURRING OPINION.

KELLY, J.—It is in proof in this case that the plaintiff was an original incorporator and stockholder of the defendant corporation, and that no corporate action was ever taken to divest him of his right as such stockholder.

Mr. H. G. Hester, who testifies that he has been connected with the New Orleans Cotton Exchange, as Secretary or Superintendent, from the period of its first organization continuously until the present time, testified as follows:

"Q. The first notarial charter passed incorporated this institution, and stated who the stockholders were?

"A. Yes, sir.

"Q. And among them it is stated that Mr. Vaudry was a stockholder?

"A. Yes, sir. (A duly certified copy of the notarial Act of

Incorporation, in which the plaintiff's name appears as a stockholder, is in evidence).

"Q. That fixed the fact that he was a stockholder, whether a certificate was issued or not? Now, the question is asked you, whether or not his stock, or his rights as a stockholder, as declared in that charter, were subsequently forfeited by any distinct act of the corporation?

"A. No. There was no action taken by the corporation at all."

Upon such evidence Vaudry would, undoubtedly, be held liable, at the suit of any creditor of the corporation, as a stockholder; and I consider the evidence quite conclusive in the affirmative, upon the question raised in this case, whether or not Vaudry was a stockholder when the demand for a certificate of stock was made in 1884.

The claim in reconvention, made conditionally and alternatively, in the event it should be held, that the defence that Vaudry was not a stockholder, is untenable, that, then and in that contingency, he be adjudged liable to the defendant corporation for annual dues as set forth in the reconventional demand, is not entitled to be maintained. The annual dues claimed are not for contributions called or assessed against shares of stock; nor is it pretended that liability for such annual dues is incident to the ownership of the stock, except as attendant upon the exercise by the owner of the stock of the privileges of the floor of the Exchange as member. It is manifest, from all the proof, that ownership of stock does not involve liability for dues for the privilege of the floor of the Exchange by a stockholder not claiming or exercising such privilege.

A stockholder removing from the City of New Orleans, as Vaudry did, and having no occasion or opportunity to make use of the privilege of the floor of the Exchange, as a member, for the purpose of the transaction of business there, could receive no equivalent, in that way, for the dues charged specifically for the right to exercise such privilege, and *not* for the right to own and hold stock in the corporation. It would be unjust and inequi-

table to charge Vaudry for the right of owning and holding stock in the corporation, with annual dues for privileges of the transaction of his business on the floor of the Exchange, which it is not pretended that he claimed or exercised during the period specified in the reconventional demand.

I concur generally in the opinion in the cause of my learned colleague and in the decree proposed.

ON APPLICATION FOR REHEARING.

KELLY, J.—The questions of law arising upon the undisputed facts of this case, were very fully and ably argued by counsel of both parties, and were determined by the Court upon due deliberation, upon grounds stated in the opinions of both Judges, delivered when the decree was rendered.

We have considered the brief of counsel, submitted in support of this application, and we still adhere to the conclusions heretofore announced. The learned counsel could not, it would seem, have read the opinion heretofore delivered by me in the cause, or they would not have assigned, as a ground in support of this application, that there is error in the decision in not passing upon the defendant's reconventional demand. The effect of the decree plainly is, as it was intended to be, to reject the reconventional demand; and the reasons why it was considered that this should be done are stated in the concurring opinion.

The rehearing is denied.

No. 418.

LEON GODCHAUX *v.* BOARD OF ASSESSORS.

1. The fact that money has been borrowed, even though from a non-resident, constitutes no defence against its assessment and taxation, in the hands of him who has possession of it.
2. The tax debtor cannot demand that the aggregate of his debts be deducted from the total of his assets, and restrict his assessment to the balance remaining.

Appeal from Civil District Court, Division E. Lazarus, J.

T. Gilmore & Sons for plaintiff and appellant.

W. H. Rogers and Wynne Rogers for defendant and appellee.

McGLOIN, J.—Plaintiff complains of an assessment against him of twenty-five thousand dollars, as money at interest, credits, bills receivable, for moneys loaned or advanced. The testimony of plaintiff himself discloses the fact that he has property of this kind, far in excess of the sum placed against him upon the assessment roll.

He shows, however, a large sum of money as borrowed by him from parties in New York, and in this city, and his contention is that the aggregate of his debts must be taken from the aggregate of his credits, and the surplus only, if any, taxed as credits, etc.

It is well settled that credits, of the kind in question, are property, and subject to taxation as such.

Cooley on Taxation, Edition 1876, page 159, note 1.

City of New Orleans vs. Insurance Co., 30 La. An. 876.

Upon general principles, it is hard to conceive any just reason why this class of property should not bear its share of the expenses of government, as well as real estate, or movable property of any kind. It receives its share of police and other protection, and its owners enjoy, as well as others, the advantages of civilized, social government.

Nor can the law, in imposing taxes upon the property of its citizens, concern itself about the indebtedness which they may have upon them. Many of our citizens are, as plaintiff in this case, indebted to non-residents, and if the principle were recognized for which plaintiff contends, there would be found serious deficits in the public revenues.

In considering the position of plaintiff, we cannot perceive, if he can deduct his gross indebtedness from the total of his credits, moneys at interest, etc., why he had not his option to deduct this amount from the gross of any other class of property for which he is assessed, as real estate, clothing and stock in his store. The legitimate conclusion would be that the State, or

city, can tax, in any case, only the general surplus existing in the taxpayer's favor, of total assets over total indebtedness. In such view, even if those who held the credits were all residents of this State and Parish, the same as their debtors, there would be an uncertainty and confusion introduced which would be fatal to our system of assessment and collection.

The Judge *a quo* decided against plaintiff and correctly.

Cooley on Taxation, Ed. 1876, page 159, and note 1, pages 160, 161, and note 2.

The judgment appealed from is therefore affirmed; plaintiff and appellant to pay all costs.

No. 299.

EUGSTER & CO. *v.* LA COMPAGNIE COMMERCIALE DE TRANSPORTS A VAPEUR FRANÇAIS.

1. In the application of Sections 2668 and 2669 of the Revised Statutes of this State, forbidding the use of the words "and Co.," where there is no actual partnership, the issue depends upon whether or not, as a fact, there was such misuse of the formula named. Contracts are not to be annulled, by operation of these Sections, simply because counsel has, through inadvertence, declared a firm to be composed of only one member, when, in fact, there were more than one composing such firm.
2. Amendments to pleadings are to be regarded favorably, and received liberally, where justice is promoted, and a multiplicity of suits is to be avoided.
3. Where there is a doubt as to the propriety of an amendment, the benefit of such doubt should be given in favor of the amendment.
4. Where, therefore, in a petition setting up a cause of action in favor of a firm, it is stated, through error, that the firm is composed of one party named, an amendment should be allowed setting forth the true facts of the case, and disclosing the names of all the co-partners.

Appeal from Civil District Court, Division C. Monroe, J.

Blanc & Butler for plaintiffs, appellants.

Henry Denis for defendant, appellee.

KELLY, J.—This is an action for damages for alleged non-performance and breach by the defendant Company of contracts of affreightment.

The original petition, upon its face, appears to be the "petition of Eugster & Co., doing business in the City of New Orleans, composed of Fidèle Eugster, who temporarily resides in said City." Throughout the body of the petition it purports to be the petition of "petitioners" in the plural. In an affidavit, at the foot of the petition, "F. Eugster, being duly sworn, doth depose and say, he is *a member* of Eugster & Co., and has read the foregoing petition, that all the facts alleged therein are true."

The defendant Company excepts peremptorily to the action on the ground: "that said petition discloses and alleges the fact that plaintiff herein, Fidèle Eugster, is transacting business, in this city, under the fictitious name of Eugster & Co., and is the sole member of said fictitious firm, in violation of Sections 2668 and 2669 of the Revised Statutes of this State, which forbid the same and delare it a misdemeanor; that said petition avers that it is under the same fictitious name of Eugster & Co., that the plaintiff has contracted with the defendants, in the manner stated by him; that said plaintiff, therefore, discloses no lawful cause of action and cannot be permitted to allege his own violation of law and ask for judgment thereunder and against these defendants," and the defendants pray that their exception be maintained and the suit dismissed.

From a bill of exception in the record it appears, that, on the trial of the exception, counsel for plaintiff asked leave to file a supplemental and amended petition, showing that the petition originally filed was written by plaintiffs' attorneys, and that said plaintiffs, acting through Fidèle Eugster, inadvertently affirmed the correctness of the same, without perceiving that the said attorneys had alleged therein that the firm of Eugster & Co. was composed of Fidèle Eugster, "when in truth, and in fact, the said Fidele Eugster is, and then was, the sole resident member of said firm, and Charles F. Orthwein and William Orthwein, of Orthwein Brothers, St. Louis, Missouri, now are, then were, and since the month of June, 1882, have been members of said firm of Eugster & Co., the plaintiff in the suit."

The supplemental and amended petition, duly sworn to by

Fidèle Eugster, is annexed to the bill of exceptions. It appears from the bill that the counsel for defendants objected to the filing of the supplemental petition, and that the Court sustained the objection, and refused to allow the amended petition to be filed, to which ruling of the Court the bill of exception was duly taken. It further appears from the record, that having refused to allow the proposed amendment to be made, the Court sustained the exception to the original petition and dismissed the suit.

The Court, in our judgment, erred in refusing to allow the supplemental and amended petition to be filed.

The only effect which the Sections of the Revised Statutes, made the basis of the exception, are entitled to have, upon the contracts and right of action of Eugster & Co., depends altogether *upon the fact* whether there *has or has not* been any infraction of the prohibition of the Statute, and that depends upon *the further fact*, whether "and Co.," in the style of Eugster & Co., did or did not, at the time the contracts were made and the suit instituted, represent an "actual partner or partners." If those words did, as is averred upon oath in the supplemental petition, represent actual partners other than Fidèle Eugster, then, there never was any infraction at all of the statutory prohibition at any time. The penalty and disability denounced by the Statute are to be incurred only by infraction of the prohibitory clause of the Statute, and not by a mere inadvertent error or misstatement in a pleading filed in a court of justice on behalf of a firm lawfully constituted.

Upon the averment thus directly made by the amendment tendered, that the words "and Co." in the style of the firm of Eugster & Co., represent and did represent at the time the contracts were made and the suit was instituted, actual partners, other than Fidèle Eugster, that is to say William Orthwein and Charles F. Orthwein, the defendants are entitled to take issue and demand proof, if they so elect. We do not consider, however, that they have the right, after tender of the amendment, to insist that even if the truth be as averred in the amendment, that Eugster & Co. consisted, when the contracts were made and

the suit was instituted, of Fidèle Eugster, William Orthwein and Charles F. Orthwein, that, nevertheless, the firm is effectually and finally estopped from averring and proving the truth of the matter, by the form of the pleading first filed; and to insist that although it be true that the firm is and was a lawfully constituted firm of three members, and it be also true that the form of the first pleading, in the particular relied on to operate the estoppel, was the result of inadvertent error, that the effect of such inadvertent error must still be to deprive the firm of its right of action and to reduce its contracts to nullities no longer enforceable in a court of justice.

In 5 La. An. 566, it is said that the Supreme Court will more readily sanction the allowance than the refusal of an amendment, as the former is less likely to do injustice than the latter.

The general rule is well settled, that amendments to the pleadings should be liberally admitted where they do not alter the substance of the demand or defence, and are not interposed for delay, but with a view to the furtherance of justice, and the avoidance of the sacrifice of substance to form. C. P. 419, 420, 421; 5 La. An. 674; 10 La. An. 599; 13 La. An. 412; 14 La. An. 355; 27 La. An. 316.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be reversed and avoided, and that this cause be remanded to the lower court with directions to allow the supplemental and amended petition, annexed to the bill of exceptions taken on behalf of the plaintiffs herein, to be filed, and to proceed to try and determine the case upon the pleadings as thus amended, and any further pleadings which the parties may be entitled to tender in conformity to law, and that the appellees pay the costs of this appeal.

CONCURRING OPINION.

McGLOIN, J.—In this case the petition, taken as an entirety, and considered in connection with the affidavit, can scarcely be considered as alleging unequivocally, and beyond all doubt or

uncertainty, that Fidèle Eugster *alone* constituted the firm of Eugster & Co. The petition is that of Eugster & Co., and not primarily of Fidèle Eugster, and throughout, including the prayer, it uses, with persistence, the term "petitioners," instead of "petitioner," with verbs likewise in the plural number to correspond. So, in the affidavit, Fidèle Eugster does not swear that he alone composes the firm of Eugster & Co., but on the contrary, he makes oath positive that he is "a member of Eugster & Co." See Ferguson vs. King, 5 La. An. 642.

The rule is, that amendments favoring justice and tending to prevent multiplicity of suits, are to be favored. Jelks vs. Smith, 5 La. An. 674; Mouton vs. Cameau's Heirs, 5 La. An. 566; Swilley vs. Low, 13 La. An. 412; Richardson vs. Fenner, 10 La. An. 600.

I consider that there was a doubt, and that the learned Judge *a quo* should have given to plaintiffs the benefit thereof.

Nor has an examination of the authorities satisfied me that the law is so very rigid in excluding amendments of this kind, where the plaintiff is clearly a firm, and the amendment relates not to the character of the action sought to be enforced by that firm, but to the composition of the firm itself. R. W. Estlin, Liquidator, vs. Ryder, 20 La. An. 251, was a case where plaintiff sued as liquidator of a firm composed of himself and ————. Subsequently an amendment was permitted, setting up that that there was no liquidator, and the partners were permitted to carry on the suit in their own names and interests. So in Payne vs. Fenlow, 21 La. An. 160, a suit instituted originally by Payne, surviving partner and liquidator, was changed into one by Payne, individually.

The reception of the amended petition must do away with the question of illegality presented in the exception of defendant to the petition; hence, I see no necessity which demands an expression of opinion upon the merits of said exception.

For these reasons I concur in the decree.

No. 416.

H. DOLL *v.* HENRY WEBER.

1. Where a party files an assignment of errors, in a case coming up on statement of facts, this Court will confine itself exclusively to the errors particularly assigned.
2. A statement of facts, in a case coming to this Court on law alone, should be a statement of the ultimate facts or propositions which the evidence was intended to establish, and not a mere resumé of the evidence given below. It must be sufficient in itself, without inferences, or balancing of testimony. Without these qualities, it is not a statement to be here acted upon.
3. Where the Judge finds what he regards as the ultimate facts of a case, appellant cannot assign as error that there were other or different facts established; nor can the assignment proceed upon the assumption that there were such further or different facts.
4. An assignment must fully and plainly state the error complained of. Nothing can be assigned which depends upon the facts of the case, or which might have been cured below by legal evidence upon the trial.

Appeal from Civil District Court, Division D. Rightor, J.

E. K. Skinner for plaintiff, appellee.

W. W. Handlin for defendant, appellant.

KELLY, J.—This is a case involving less than five hundred dollars, as to which the appellate jurisdiction of this Court is limited to questions of law only.

There was a special finding of facts by the Judge *a quo*, and the question of the sufficiency of the facts so found, in law, to warrant the judgment rendered, might have been brought before this Court for determination by appeal, which would have been maintainable, upon that question, without any formal assignment of error having been made in this Court. But the appellant has seen proper to make a formal assignment of the errors of which he complains; and where such formal assignment is made, the Court is not called upon to inquire whether there be or be not other error apparent on the record than as specially assigned by the appellant. See Gex vs. Rehm, No. 261 of the docket of this Court.

It is not assigned as error that the facts found by the Judge

are insufficient to support the judgment, but that the appellant was entitled to "a statement of all the facts in the case, and not merely the conclusions of the Judge upon the facts."

In Alford vs. Heyman & Levy, No. 260 of the docket of this Court, occasion was taken to quote, as applicable to appellate procedure in the class of cases as to which the jurisdiction of this Court is limited to questions of law alone, the language of the Supreme Court of the United States in Burr vs. Des Moines Co., 1 Wallace, 102, where it was said: "The statement of facts on which this Court will inquire if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which the ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing of evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this Court, but must have all the sufficiency, fulness and perspecuity of a special verdict. If it requires of the Court to weigh conflicting testimony, or to balance admitted facts, and to determine from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this Court can act upon."

The learned Judge *a quo* finds certain ultimate facts, and states that further he cannot find. The first assignment of error proceeds upon the assumption that there *were other* facts established by the proof, which ought to have been stated by the Judge. But error cannot be assigned on such ground, even where the appellate jurisdiction extends to questions of fact as well as of law.

In Kroeubler vs. Bank, 12 R. 456, it was held that, in an assignment of error, the errors must be plainly and fully stated; and that nothing can be assigned as error which depends upon the facts of the case. "There are many decisions of this Court," it was said, "stating what can be assigned as apparent error;

and there are no principles better settled than that the party complaining must plainly and fully state the errors, and that nothing can be assigned which depends upon the facts of the case, nor which could have been cured by legal evidence on the trial."

The second and third assignments seek directly to raise questions as to the correctness of the finding of facts by the Court below, and the sufficiency of it, upon the evidence before it; matter not assignable as error of law, and as to which, furthermore, the jurisdiction of the lower court is made by the Constitution final, and not subject to review by this Court on appeal.

The judgment appealed from is therefore affirmed at appellant's cost.

No. 237.

MOSES LOBE & Co. *v.* ABRAHAM REINACH & Co.

1. A contract between debtor and creditor must be executed as indivisible, even though it be in its nature susceptible of division. Alford vs. Tiblier, 1 McGloin, 157, affirmed.
2. Where a vendor tenders goods, only a portion of which are up, in quality, to the standard agreed upon, the purchaser may decline the lot; and where, in such case, the vendee had furnished the material for the manufacture of such goods, the latter, after proper default, may demand and recover the value of his entire material.
3. That a vendor, in such a case, who has been placed *in mora*, completes subsequently, in quality as well as quantity, the lot contracted for, and has the same thus completed at the date of the trial of the cause, cannot affect the result.

Appeal from Civil District Court, Division E. Lazarus, J.

E. E. Moise for plaintiffs, appellants.

W. S. Benedict for defendants, appellees.

ROGERS, J.—This appeal comes before us for a second time—now on a statement of facts. It appears both defendants and plaintiffs submitted the facts to the Judge, who, upon a failure to agree as to facts proved, before the motion for this appeal, made

out and signed a statement of facts. We consider this sufficient. C. P. Arts. 602, 603.

The facts stated are:

Plaintiffs contracted with defendants to manufacture and deliver to them 38¾ dozen pairs of pantaloons for the sum of $106.59, plaintiffs to furnish the material necessary; this was done. The pantaloons were to be made in a workmanlike manner and merchantable, well sewed, with buttons attached and shapely in cut. Defendants tendered 38¾ dozen pairs of pantaloons which were refused, as not according to contract. Defendants were placed in default and in turn defendants placed plaintiffs in default. At the time of tender the pantaloons were not made according to contract, though some were, and it was impossible to tell, from the evidence, how many or what proportion of the whole were not in accordance with the contract.

Under this condition of fact, were the plaintiffs compelled to receive less than the whole contract?

Parties are bound as they choose to bind themselves, and courts will not interfere to change the rules and conditions thus imposed.

We had occasion in Alford vs. Tiblier, 1 McGloin, 157, to hold that when certain mules of a certain height were contracted to be delivered, and only a part was tendered, that the party was not compelled to accept the delivery, Art. 2111 C. C. controlled, requiring that the contract between the creditor and debtor be executed as indivisible, although susceptible of division. See also C. C. 2153.

We still hold to these views. An examination of the law presented by counsel, in this case, strengthens us in our opinion as to the correctness thereof.

The facts stated show the amount claimed by plaintiffs, $454.74, is correct, and that only a part of the pantaloons was tendered, after a proper placing *in mora:* that at the time of trial all were in condition as contracted for, cannot relieve defendants. 8 Rob. 161; 14 La. An. 713; 24 La. An. 235.

It is ordered, adjudged and decreed, that the judgment

of the District Court be avoided and set aside, in so far as it dismisses plaintiffs' claim, and it is ordered, adjudged and decreed that plaintiffs have judgment against defendants, A. Reinach & Co., and the members thereof, Abraham Reinach and J. A. Reinach, *in solido*, for the sum of four hundred and fifty-four 74-100 dollars ($454.74) with legal interest from judicial demand, otherwise said judgment is affirmed. Defendants paying costs of both Courts.

No. 345.

MOFFATT & TAYLOR *v.* THEIR CREDITORS. ON PETITION OF GEORGE ZIEGLER *v.* MOFFATT AND TAYLOR & CHARLES THORN.

1. A debtor asking a respite, is not considered in law as an insolvent; the concession of such respite, differing in this from a surrender, is based upon the supposition of solvency.
2. In a case of surrender, the property of the debtor is administered by the creditors, through a syndic of their choice; in case of respite, however, the property remains with the debtor.
3. In case of respite, where a creditor opposes and secures bond, under La. C. C. 3093, that bond secures the full payment of his debt, at the date indicated, and not a mere *pro rata* of what the debtor subsequently surrenders.

Appeal from Civil District Court, Division A. Tissot, J.

Charles S. Rice for Moffat & Taylor & Charles Thorn, appellants.

Braughn, Buck, Dinkelspiel & Hart for George Ziegler, appellee.

KELLY, J.—Moffatt & Taylor, a commercial firm, applied for and obtained a respite, a majority in number and amount of their creditors voting to allow it. On their schedules their assets were represented as of the value of $41,000 and their liabilities at less than $33,000.

George Ziegler, who was a creditor in the sum of $362.79, opposed the granting of the respite, and applied for and obtained such security for his debt as is provided by Art. 3093 of the Civil Code. The amount for which the debtors were required, by order of Court, to give bond and surety was $483, or one-

third over and above the amount of the debt to be secured. 11 La. An. 36, 38.

The condition of the obligation of the bond, in conformity to Art. 3093 (3060) C. C. is, "such that if Moffatt & Taylor shall not alienate the property left in their possession, or in case they do, that the money arising from the sale thereof shall be applied in paying their debts existing at the time of their applying for their respite, then the obligation to be void, otherwise to remain in full force and virtue." Charles Thorn became the surety of Moffatt & Taylor on this bond.

A creditor, who opposes the granting of a respite, is bound by the will of the creditors who are willing to accord it, only upon condition that he may demand the security provided by Art. 3093 C. C.; and the debtor's right to a respite as against such creditor depends upon the giving of such security. If Moffatt & Taylor, therefore, had not executed and delivered to Ziegler the bond upon which Charles Thorn was their surety, there would have been no respite as to Ziegler, and he could have proceeded at once to collect his debt by direct action and execution levied upon the property of his debtors, represented by them at the time of their application for respite as of the value of $41,000.

A debtor who, unable to pay all his debts at the moment, obtains from his creditors a delay, is not regarded as an insolvent. The concession of a respite is based upon his supposed solvency, or eventual ability to pay all his debts. 3 R. 407, 410. A respite differs essentially from a surrender in that the latter is based upon the supposed insolvency, while the former is based upon the supposed solvency. In a cession, the property of the debtor surrendered to his creditors is administered by them through a syndic of their choice, acting as their agent and representative, while in the respite it remains in the possession of and is administered by the debtor. 12 La. An. 182.

It would appear, therefore, to be reasonable to consider that the security, which the Code provides may be demanded by a creditor opposing the allowance of the respite, is intended to be for the payment of the debt in full, within the delays allowed,

and not for the payment of a part of it only, as in case of a claim against an estate administered upon as insolvent. The fact that the courts require bond to be given for one-third over and above the amount of the debt, would indicate that they considered that the purpose of the bond was to secure the payment of the debt in full, in the event of the breach of the conditions of the bond.

From the statement of facts in the record, in this case, it appears that after execution and delivery to Ziegler of the bond in this case, Moffatt & Taylor, instead of complying with either of its alternative conditions, disposed of all of the $41,000 worth of assets left in their hands, and instead of applying the proceeds, in conformity to the alternative condition of the bond, to the payment of their debts existing at the time of their application for respite, used the whole of such proceeds—except the sum of $1,100, under a lease existing at the time of the respite—was used in paying debts contracted after the respite had been obtained. The assets left in their hands, of the value, according to their own sworn representation, of $41,000, were all alienated for the comparatively small sum of about $13,000.

In an action upon the bond given to Ziegler, in which these gross breaches of its conditions are averred and shown, judgment was rendered in his favor and against Moffatt & Taylor and their surety, not for the amount of the penalty of the bond, but for the sum of the debt, with interest, which it was given to secure, and which, by its execution and delivery, had prevented Ziegler from proceeding to collect, by direct action against his debtors and execution against their estate, represented by them at the time as of the value of $41,000.

From this judgment Moffatt & Taylor and their surety have taken this appeal, and it is insisted here that the only judgment Ziegler was entitled to recover upon the bond, upon the breach of its conditions, was such *pro rata* of his debt as he would have been entitled to receive had the estate of Moffatt & Taylor been left in their hands, to be administered upon by them as a bankrupt or insolvent estate. The learned and ingenious counsel for

Moffatt & Taylor, and their surety on the bond, does not, it is true, put it precisely in that way, but in a more plausible shape. But, what he contends for, amounts to the same, thing *i. e.* that Ziegler is only entitled to recover judgment upon the bond for a *pro rata* dividend of the proceeds which came into the hands of their debtors from their administration of the assets left in their hands; such dividend to be determined by the *ratio* which the entire proceeds so received by the debtors bear to their entire indebtedness. The law, upon the particular point in question, is not, perhaps, as plain and free from ambiguity as it is desirable it should be. But the arguments of the learned counsel for appellants, and consideration of the authorities referred to by him, have not satisfied us that Moffatt & Taylor and their surety are entitled to claim that their liability upon the bond to Ziegler is to be limited to the liability which would be incident to the administration of an estate administered upon as insolvent. On the contrary, we think they should be held to the liability of administrators of an estate which, upon their own showing, was entirely solvent, when they were permitted, *quoad* Ziegler, to retain the administration of it, upon condition of the execution and delivery of their bond to him. Upon the whole, the judgment appealed from appears to us to administer justice between the parties according to law, and it is therefore affirmed.

No. 424.

J. W. DEMAREST *v.* W. J. BEIRNE.

1. The surety upon a devolutive appeal bond secures the appellee against costs for which the latter is or may become liable; it does not extend to costs which, under the Stamp Law, must be paid by the appellant.
2. The costs of transcript must be paid at the time of appeal by the appellant, and the costs of the clerk of the Supreme Court must be covered by cash deposit, or by special bond. Such costs, therefore, are not covered by the bond in a devolutive appeal.
3. The surety upon such a bond, who has paid costs of the character last described, is not entitled to a credit, for the amount of such payments, when sued upon his bond.

Appeal from Civil District Court, Division D. Rightor, J.

Singleton, Browne & Choate for plaintiff, appellant.

Andrew J. Murphy for defendant, appellee.

KELLY, J.—This is a proceeding by rule against W. S. Benedict, Esq., as surety of the defendant, W. J. Beirne, upon two bonds of devolutive appeal, one for $200, and the other for $100. Both judgments appealed from were affirmed, and it is not disputed that the surety's liability on both bonds was fixed before the rule was taken, but the defence is, that both bonds were fully discharged by payment by the surety (before the rule on him was taken) of costs secured by the bonds to the full amount thereof. It is understood to be admitted that such is the case as to the bond for $100; but as to the $200 bond, it is insisted that the payments of costs by the surety, relied on as payments in discharge of his liability on the bond, are not entitled to be so considered, and that he is still legally liable to the plaintiff for the whole amount of that bond. There was judgment below for the plaintiff for twenty-six dollars and costs of the rule, and from this judgment he has appealed.

The case comes before us on an agreed statement of facts, which presents for determination a single question of law, and that is, whether a surety's liability upon a devolutive appeal bond for costs extends to costs of the transcript of appeal, and to the costs of the Clerk of the Supreme Court, and may be discharged by payment by the surety of costs of such character.

The surety on an appeal bond is the surety of the appellant, who is principal in the bond, which is given for the security of the *appellee;* and there can be no liability of the surety on the bond for anything for which the principal in the bond may not become liable to the appellee; and the surety's liability attaches only when the liability of the principal attaches, and as ancillary thereto. In no event can an appellant become liable to an appellee for costs, which the latter is neither required to pay or to become liable for, and of this character are costs of transcripts of appeal, which are to be paid for, in the Parish of Orleans, by the appellant in stamps of the judicial fund; nor for the costs of the

Clerk of the Supreme Court, which are to be paid or secured by the appellant to the clerk, and for which, no more than for the cost of the transcript, can any liability of the appellant to the appellee arise to which the security of the appeal bond could attach. It follows, therefore, that payment by a surety on an appeal bond, for the party to the suit, of costs of that character, as to which no liability to the adverse party in any event can arise, are not entitled to be credited as payments in discharge of indebtedness of the appellant to the appellee for costs paid or incurred by the latter, and to secure the payment of which the bond was given. 36 La. An. 190; 4 La. An. 3; C. P. 575, 578.

It is therefore ordered, adjudged and decreed that the judgment appealed from herein be amended so as to increase the amount which the plaintiff, J. W. Demarest, is decreed entitled to recover of the defendant, W. S. Benedict, from twenty-six dollars to two hundred dollars, with interest from judicial demand and costs, and that as thus amended the said judgment be affirmed; the costs of the appeal to be paid by the appellee.

No. 248.

THOMAS H. ALLEN & Co. *v.* JOHN S. HORNOR & SON ET ALS.

1. Where, on receipt of a telegram announcing shipment of cotton, and asking if a draft will be honored, the party addressed answers that he will pay the draft against the cotton shipped, held, this is an authorization to draw, coupled with a condition.
2. Where, in such a case, the draft is drawn, and is discounted by a party, at whose instance, before discounting, this exchange of telegrams was had, and a bill of lading supposed to represent the cotton in question is attached, and it transpires that the bill of lading is fraudulent, having been raised or altered from a bill of lading covering merely a box of cotton seed—held, the draft is, in fact, one drawn not against cotton, and not within the limit of the original authorization.
3. Where, said fraudulent bill of lading being attached, and upon the faith thereof, the drawee, in ignorance of the fraud, pays such draft, it is a case of payment through error, and the amount thereof may be recovered back from the original drawee.
4. In such a case, neither the draft nor the bill of lading need be surrendered, or tendered to the defendant, before institution of the suit.
5. Nor need plaintiff, in such a case, establish a tender of the box of cotton seed, actually shipped.

Appeal from Civil District Court, Division B. Houston, J.

Percy Roberts for plaintiffs, appellees.

T. J. Semmes & Payne for defendants, appellants.

ROGERS, J.—On the 11th day of December, 1882, a man representing himself as W. B. Reeves, of W. B. Reeves & Bro., entered the banking house of defendants, Hornor & Son, in Helena Ark., and asked the senior member of the house if the bank would discount a draft drawn by him (Reeves) on the house of Thos. H. Allen & Co., of New Orleans, offering a bill of lading for twenty-one bales of cotton as collateral security. The firm of Hornor & Son declined to discount his draft, not knowing Reeves, unless he first obtained authority from said Thos. H. Allen & Co. to do so. Reeves volunteered to obtain authority from either the house of Thos. H. Allen & Co., in Memphis, or the one in New Orleans. He left the bank, and in about the time necessary to send and receive a telegram from New Orleans, returned with the following:

"Will pay draft of $700 against twenty-one bales.

(Signed) THOS. H. ALLEN & Co."

This being an answer to Reeves' telegram, which read:

"Thos. H. Allen & Co.:

"Have shipped you twenty-one bales of cotton per steamer Chouteau. Will you honor our draft for $700?

(Signed) W. R. REEVES & BRO."

Hornor & Son, recognizing the bill of lading to be properly signed—as they held at that time other bills of lading signed on that trip by the clerk of the Chouteau, the clerk using a fac-simile stamp—and considering Reeves as a correspondent of Thos. H. Allen & Co., with limited authority to draw upon them, took the bill of lading and telegram, discounted the draft in good faith, and forwarded all together to Burbridge & Co., by whom said draft was presented to Thos. H. Allen & Co., and by them paid without hesitation or comment. Some days afterwards, upon the arrival of the Chouteau, it was for the first time discovered that the bill of lading had been altered, the only thing shipped being a box of cotton seed consigned to Thos. H. Allen & Co.

Demand was then made by Allen & Co. upon Burbridge & Co. for the money paid when the draft was taken up, and said demand was refused; there was no tender by Thos. H. Allen & Co. of the draft, bill of lading, or box of cotton seed at the time said money was demanded, or at any time since.

Plaintiffs bring suit against Hornor & Son and J. W. Burbridge & Co., who endorsed the draft and collected it from plaintiffs.

The facts disclose, that Reeves & Co. were unknown to either party—that this was the first transaction of any character ever had with them. It is evident that the dispatch of Allen & Co. was induced by no faith whatever in Reeves, but by the shipment to them of twenty-one bales of cotton.

Their agreement, therefore, was not properly an acceptance of the draft of Reeves; it was a promise to pay a draft against twenty-one bales of cotton shipped by steamer Chouteau, or an authority to Reeves to draw on them on the condition that twenty-one bales of cotton were shipped to them by said steamer. None of the essential elements of negotiability attached to a draft or bill of exchange could be implied, that would bind an acceptor under the rules of commercial law—nothing to indicate that faith in the drawer, which excludes all theory of a claim for indemnity against or recourse to the holder of the instrument. Strictly speaking, therefore, conditional drafts, or conditional acceptances, are not commercial paper, their payment is due upon condition, and not in any event; the general rule of commercial law is not therefore applicable; the very condition they express disposes of the privileges granted in favor of commerce to negotiable instruments, which closes the avenues of defence open to all other and ordinary transactions.

The defendants are not third persons, they are primarily the real parties. They received from Reeves the bill of lading, the representative of the twenty-one bales of cotton, knowing full well that the condition upon which plaintiffs would pay the draft discounted by them, was the shipment of the cotton, and besides inserting in the body of the draft a reference to the

bill of lading and telegrams, attached them to the draft, as evidence that they had seen to the performance of the condition stipulated by the plaintiffs. It will not do, therefore, to say that this holder of the draft is absolved from all responsibility from acts of negligence and indifference, and that responsibility and liability shift to the shoulders of the one who has agreed to pay. It is not a question of equal negligence or a division of responsibility—for one might have refused the discount, it is true—or that the other might have refused payment, is equally true—but a consideration of condition precedent having been assumed and the belief of its performance having been impressed and regarded, does not alter the fact that the condition was not performed and the money paid in error.

We have fully discussed and determined our view of the law governing bills of lading in the case of John Phelps & Co. vs. Mechanics' & Farmers' Bank, 2 McGloin, 11, and in adhering to those views, do not consider it necessary to determine the proposition, that the delivery of the bill of lading to plaintiffs was a fulfilment of the condition imposed by their dispatch.

The law as held by us in Agnel vs. Ellis, 1 McGloin, 61, is applicable to this case, and we must be governed by the laws of Louisiana.

The present action is not brought to rescind a contract under Arts. 2045, 2047 C. C. It is based on Arts. 1893, 2302 C. C.

The position of the plaintiffs is, that we paid to you seven hundred dollars on the delivery to us of twenty-one bales of cotton; that you transferred to us what purported to represent said property—a bill of lading; in fact, you transferred to us nothing—neither the cotton specified, nor a bill of lading. The inducement for the payment to you was the supposition that you transferred the property; that was the cause and motive for our payment. You must return to us the money paid you in error.

The plea urged by defendants, that this action must be dismissed because no tender was made of the box of cotton seed, or the draft or the bill of lading, is made on erroneous views of the conditions of this controversy. As to the box of

cotton seed, there is no evidence that it was ever received at this port—certainly nothing to indicate that plaintiffs received it. Defendants certainly placed it beyond the power of plaintiffs to obtain it, as the bill of lading delivered purported to be for entirely different articles, and was a worthless piece of paper as it purported to represent property. The draft was plaintiffs' voucher for the payment to defendants, and there was no reason to return it, no right in defendants to claim it. The bill of lading, as already stated, was a mere worthless paper and evidenced nothing but the crime admitted to have been perpetrated and was attached to the draft with the telegram as a part, and setting forth its consideration. The necessity of putting in default, under Arts. 1912, 1913 and 1914 C. C., arises from the principle based upon the benefit derived by the one who has received and the consequent loss or disadvantage to the other who has made the delivery or parted with the thing. That benefit may be insignificant, the loss or disadvantage equally so, but no matter the extent, the equitable rule that parties should be placed in the same position they were at the time of the contract, exacts this pre-requisite On this principle, a person cannot keep the property and claim the price. In a case, however, where the obligation assumed was without a cause, C. C. 1896, or that a cause never existed, the principle is entirely different. We find promissory notes and bills of exchange excepted from the rule laid down in Art. 1914 C. C. The obligation, under the rules laid down in the several Articles of the Code, 1893-1896, was without the cause necessary for its validity, it was without effect. The civilians use the term *cause* in relation to obligations, in the same sense as the word consideration is used in the jurisprudence of England and the United States. It means the motive, the inducement to the agreement. Articles 1912, 1913, 1914 C. C. refer to contracts of mutual interest, when the cause of the engagement is the *thing given, or done, or engaged to be given or done, or the risk incurred* by one of the parties; but when an engagement has no cause or consideration, or, what is the same thing, when the cause for which it is contracted is *false*, the

engagement is *null*, and the contract based on it is also *null* and cannot be enforced by an action. Money paid under such an agreement can be recovered back by the action *condictio sine causa*. Mouton vs. Noble, 1 La. An. 193; C. N. Art. 1376; 11 La. An. 654.

The necessity for default implies, on the part of him who seeks a recovery, a neglect of some duty imposed by law, the performance of some condition precedent, which he should first perform or offer to perform before requiring performance from the defendant. In the present case the plaintiffs occupied the position of holding the condition precedent in their favor. They could not have been required to pay the draft before the delivery to them of the 21 bales of cotton or its representative, the bill of lading. Before defendants could have recovered on the draft, they would have been compelled to tender the property, but the fact that the plaintiffs paid the draft on the inducement or motive that defendants had complied with their agreement, did not require plaintiffs to place defendants in default for a failure to deliver, the cause never existed, there was in law and fact no inducement, and the obligation that existed before the payment of the draft, still existed with defendants as a condition precedent to deliver the property. The plaintiffs having received nothing, secured no benefits of which defendants were deprived; they, plaintiffs, had nothing to restore, the only ones benefitted by the transaction, speaking now of the draft and its payment, were defendants.

There is no dispute that timely and proper notice was given defendants of the forgery and failure of the cause of the contract; there are no averments, no proof that the acts of plaintiffs, in this regard, have occasioned loss to defendants.

Similar questions have frequently arisen in our courts, where parties have brought suit to recover back money paid in error, *e. g.*, by an acceptor of a bill, who had paid in error to a holder who had no right to receive payment. Dick vs. Leverich, 11 La. 576.

By an endorser against the holder, who had failed to have note

protested, so that recovery against a previous endorser was lost. Oakey vs Bank, 17 La. 386; Heath vs. Bank, 7 Rob. 334.

Where a payment was made on an account rendered and a receipt given, when the account was false. Massios vs. Gasquet, 4 Rob. 137.

In affirmance of the same principle and on analogous facts; 11 Rob. 102; 2 La. 129; 5 La. An. 15; 14 La. An. 499; 16 La. An. 217; 19 La. An. 328; 15 La. An. 268, 353.

The question of putting *in mora* was not raised, nor is there any intimation in any of the decisions of the propriety or necessity for the plea. Surely from such a chain of decisions the conclusion is irresistible that the principle invoked under the facts of the present case can have no application.

Judgment affirmed.

CONCURRING OPINION.

McGLOIN, J.—After being for a time of opinion that the judgment appealed from in this cause should be reversed, and after having even conveyed to my colleague my dissent from the conclusions reached by him, I have, after further consideration finally been convinced that there is no error in the judgment which has been brought up.

It is conceded, in this case, that J. W. Burbridge & Co. were merely acting for John S. Hornor & Son, for the purpose of collecting this draft; hence, the parties really to the transaction and litigation are only John S. Hornor & Son and plaintiffs, Thos. H. Allen & Co. Neither of these are innocent third persons, in the sense of the commercial law, and hence, the question of *negotiability vel non* of the draft in question, is not one necessary to the case, and I abstain from declaring that the said draft was not commercial in its character.

Between John S. Hornor & Son and Thos. H. Allen, there is nothing which can arise so as to bar out matters of defence or exception. I consider that the telegram of Thos. H. Allen & Co. to Reeves, constituted the warrant or authority to said Reeves to draw the draft in question. It may be likened in a way to a

power of attorney to that effect. It was, however, conditional, taking validity, therefore, only upon the execution of the condition. John S. Hornor & Son were well aware of the facts, knowing that the authority to Reeves was not an unconditional one, and they should not be allowed to alter its tenor, so as to emancipate the draft, drawn in obedience to it, from the influence or control, as to them, of the condition. It was their duty to see, before taking the draft, that the condition in question had been fulfilled, and if, for any reason whatever, it was difficult or inconvenient for them to do this, and they accordingly omitted it, or if they were deceived in any way, the risk was their own and not that of Thos. H. Allen & Co. As a man binds himself, so let him be bound. Thos. H. Allen & Co. bound themselves to pay a draft drawn against twenty-one bales of cotton, and to refuse them relief in this case, is to compel them to pay against their express convention, a draft drawn against a box of cotton seed.

Nor do I consider that, in a case such as this, upon general principles, Thos. H. Allen & Co., had they received, at the time of taking up the draft, anything of real value, would have been excused from the duty of restoring what was thus received, and even of tendering it as a condition precedent to instituting their suit. The evidence, however, does not show that Thos. H. Allen & Co. received the box of cotton seed. Under ordinary circumstances, a bill of lading represents the property constituting the shipment, and possession of the bill of lading constitutes a legal possession, perhaps, of the property in question. But these principles can have no application in presence of a piece of paper which has lost, by means of a fraudulent alteration, its character as a bill of lading, having been altered so as to purport to cover twenty-one bales of cotton, it could serve no longer as evidence of a contract for the delivery of one box of cotton seed. The carrier would, no doubt, ignore it entirely as a document rendered null and void by alteration of its tenor, and there arises, therefore, no presumption against plaintiffs, that, because they held this paper, they did receive, or could have received, the box of cotton seed in question. I consider this so-called bill of

lading as a piece of worthless paper. And the draft; being by an absconded drawer, drawn fraudulently and against instructions and contract, and having thereon no endorsements that could be valuable to John S. Hornor & Son, that I consider also, as a document. worth absolutely nothing

To maintain that Thos. H. Allen & Co. had to make a tender of these two instruments, before instituting this suit, would be to compel them to tender what had no appreciable value, and hence, to do what practically would be a vain thing.

We have a maxim "*de minimis non curat lex*," and if courts would concern themselves to defeat just rights, simply upon matters involving practically no more than two scraps of useless paper, they would be violating the spirit, if not the letter, of this maxim, and be compelling the law to recognize and deal with what was trifling indeed.

It may be proper to state, in closing, that the difficulty which prevented me, originally, from agreeing with my learned colleague in the conclusion he had arrived at, related solely to this question of tender, and that upon the other questions involved, I saw no difficulty, considering the case, as to them, clearly with the plaintiffs.

No. 428.

In re MRS. PAUL LAGAY, AN INTERDICT.

ON RULE OF PAUL LAGAY, CURATOR, *v.* ABRAHAM REINACH.

Where a tutor, or under tutor; a curator, or under curator, removes from this State, his office becomes *ipso facto* vacant. In such cases, no formal proceeding and judgment of removal is necessary, and the Judge may immediately appoint a successor.

Appeal from Civil District Court, Division B. Houston, J.

W. S. Benedict for plaintiff, appellee.

E. T. Florance for defendant, appellant.

KELLY, J.—This is an incidental proceeding in the matter of the interdiction of Mrs. Paul Lagay, which has come before this Court on appeal, upon an agreed statement of facts, as follows: "In this matter it is admitted that Paul Lagay was duly appointed curator, and F. E. Trepagnier under curator of the interdict and duly qualified as such.

"It is further admitted that on the 7th of December, 1885, in an *ex parte* petition of the curator, based upon affidavit, the Court was informed that the under curator had permanently left the State, and that it was necessary that some person be appointed in his place and stead. The Court thereupon, without notice to said Trepagnier, or contradictory proceeding of any kind, appointed J. E. Brou as under tutor, to take the place of F. E. Trepagnier, and said Brou duly qualified.

"It is further admitted that an order of sale issued, based upon the recommendations of a family meeting to pay debts of the interdict. That the same was regular in all respects, except in so far as its legality may be affected by the fact that said J. E. Brou was present at the deliberations and gave his assent thereto, and said F. E. Trepagnier was not present thereat and did not assent thereto.

"It is further admitted that Abraham Reinach was the last and highest bidder for the property at public sale made under an order of the Court aforesaid, and refused to comply with the adjudication for the reasons set forth in his answer to the rule to comply with said bid, and that upon the trial of said rule the same was made absolute and the said Reinach was ordered to accept the title and pay the price of adjudication. From said judgment said Reinach prosecutes this appeal. The value of the property is nineteen hundred dollars." To this agreed statement of facts, which is signed by the attorneys of the parties, plaintiff and defendant in rule, the learned Judge of the District Court, having cognizance of the cause, has added the statement that: "The adjudicatee, Reinach, did not show or attempt to show that F. E. Trepagnier had not left the State permanently, as stated in the affidavit of date of 7th December, 1885."

The answer of Reinach to the rule upon him, referred to in the agreed statement of the parties, sets forth. "that he refuses to comply with the terms of the adjudication referred to in said rule, because mover has not tendered defendant in rule a good title to the property adjudicated. That the title tendered is insufficient on its face in this, that the under curator of the interdict, whose property was adjudicated, was not present at the family meeting that advised the sale of said property, and also for other reasons patent on the face of the record." No other error has been suggested on behalf of the appellant upon the appeal than that the appointment and qualification under the circumstances above set forth, of J. E. Brou, as under curator of the interdict *vice* F. E. Trepagnier, upon the ground of the permanent removal of the latter from the State, were absolute nullities, and affected with like nullity the proceedings of the family meeting which recommended the sale, in which proceedings J. E. Brou took part as under curator It is not pretended that the Court, which appointed him, was not vested with full jurisdiction of the interdiction proceedings in which the appointment was made, and over the person and estate of the party interdicted; but it is contended that there was an entire defect of power in the Court to make appointment of another under curator, instead of one alleged to have left the State permanently, except in a proceeding had contradictorily with the alleged absentee or with a curator *ad hoc* of the absent under curator, appointed by the Court to represent him in such contradictory proceeding.

We do not understand such to be the requirement of the law. Appointments of curators and under curators of interdicted persons are made according to the same forms as appointments of tutors and under tutors of minors, and it is the duty of the under curator to act for the interdicted person whenever the interest of the interdicted person is in opposition to the interest of the curator; the under curator cannot be a member of a family meeting, but must be present for the purpose of advising, and when he is of opinion that the determination of the family meeting is injurious to the interest of the interdicted person, it

shall be his duty to oppose the homologation of the proceedings; the curatorship shall not devolve upon the under curator when the same shall become vacant, but when it shall become necessary to appoint another curator, it shall be the duty of the under curator to cause such appointment to be made, and in general, under curators are to perform all the duties required of under tutors, and shall be subject to the same responsibilities. Rev. C. C. Arts. 405 to 410. Manifestly, the functions of under curator of an interdicted person cannot be performed by one residing permanently out of the State. An under curator acquires by virtue of his appointment as such no right or interest whatever personal to himself, liable to be prejudiced in anywise by the appointment by the Court, in a proceeding not had contradictorily with him, or with any one appointed by the Court to represent him, to discharge the functions on behalf of the interdict, which, by reason of removal from the State, can no longer be performed by him; nor is it perceived how in such case the interest of the person under interdiction, one of the class of unfortunates entitled in their persons and estates to the most jealous supervision and guardianship of the Courts, would in anywise be subserved by a requirement that, in the event of the permanent departure from the State of his under curator, no appointment of another, residing in the State, to be under curator in his stead, should be made by the Court, charged with the supervision and control of the person and estate of the interdict, except in a proceeding had contradictorily with such absentee, or with a curator *ad hoc* appointed by the Court to represent him.

At a very early stage of the jurisprudence of the State, in 1827, it was held in Robins vs. Weeks, 5 N. S. 379, that all tutors, other than by nature, were deprived of their tutorship, *ipso facto*, by removal from the State.

In the Succession of Bookter, 18 La. An. 158, a family meeting had recommended the appointment of William Duncan as tutor of minors, and the homologation of the proceedings of the meeting was opposed by D. A. Watterson, on the ground that they were premature and illegal, as no judgment had been rendered

removing him, Watterson, from the tutorship, and he was, therefore, still the tutor of the minors.

"The first ground of opposition," said the Court, "would have been valid, as no judgment had been rendered against Watterson removing him from the tutorship, if it were not true that he had permanently removed from the State of Louisiana.

"By his leaving the State and by his making his residence in the District of Columbia, he ceased to be tutor of the minors as much so as if he had ceased to exist. There was no need of a judgment removing him from the tutorship."

The Civil Code, in Arts. 303 and 304, enumerate certain grounds of exclusion or removal of persons from tutorships, among which removal from the State is not mentioned. In a following Article 306, it is declared that "all the causes of incapacity, exclusion and removal, mentioned above, apply likewise to the under tutor, except, etc." By Art. 314 (298), which follows these, it is declared that "if the tutor shall die or absent himself from the State after his appointment, another tutor shall be appointed in his stead by the Judge." By this Article, death or removal from the State are alike operative to vacate the office of tutor; but it is argued on behalf of the appellant, that as this Article comes after and not before Article 306, it is to be limited in its application to the office of tutor, and cannot be held to apply to that of under tutor, or of under curator in a matter of interdiction. The *reason* of the rule manifestly extends as well to under tutors and under curators as to tutors or curators, and to limit the operation of the principle by the narrow, literal construction contended for, would tend to defeat the main intent of the law in respect of the surveillance to be exercised by the Courts over the persons and estates of the interdicted, as well through under curators as through curators. All of the law is not to be found in the mere letter—*qui hæret in litera, hæret in cortice*—but much of it lies in the general spirit, intent and purview of its enactments. And to ascertain the scope and extent

of the purview of the law, it is to be understoood and administered in conformity to the maxim *ubi eadem ratio, ibi idem jus.* In the words of Coke, "Reason is the life of the law; *ratio est anima legis;* for then we are said to apprehend the law when we know the reasons of the law." We consider it in accordance with the reason of the law of Louisiana and within its spirit, intent and meaning, to hold that an under curator of an interdicted person, who removes permanently from the State becomes *ipso facto* divested of the office, and that no formal judgment of removal is contemplated or required by law, in such case, to be rendered in a proceeding to be had contradictorily with the absent under curator, or a *curator ad hoc* of such under curator; but that the law contemplates and intends that, in such case, such proceedings may be had as were had in this case.

The judgment appealed from is therefore affirmed at appellant's costs.

No. 246.

ALFORD BETTIS & Co. *v.* S. W. SAWYER. MORSE, Intervenor.

1. Where, within a reasonable delay, the party contemplating an appeal, applies to the Judge *a quo* for a statement of facts (opposing counsel having refused to co-operate), and the said Judge declares himself unable to furnish such statement, by reason of having forgotten the facts, the cause will be remanded.
2. Where, however, the delay allowed to elapse between the rendition of the judgment and the application for such statement is so long that the Judge might reasonably be expected to forget the facts, the party thus delaying will be held responsible, and the appeal will be dismissed.
3. No question, or issue, dependent entirely or in part upon the evidence, taken below, but not brought up in original, or by statement, can be presented by way of assignment of error.

Appeal from Civil District Court, Division C. Monroe, J.

W. S. Parkerson for plaintiff.

A. C. Lewis and *T. M. Gill* for intervenor.

E. E. Moise curator *ad hoc.*

ROGERS, J.—Plaintiffs sued Sawyer for $170, the purchase price of certain mules, claiming vendor's lien and privilege, and sequestered them in the hands of R. S. Morse, who intervened and claimed ownership, alleging a purchase by him from Sawyer.

The District Judge awarded a personal judgment against Sawyer for $470; refused to recognize his vendor's lien and dismissed the writ of sequestration. He decreed in favor of Morse, intervenor, sustaining his claim of ownership.

The case was decided in December, 1882. Just before the expiration of the year in which he could take an appeal, he applied to the District Judge to sign a statement of fact, which was refused on the ground that the case had been tried and determined so long a time before, that the Judge had forgotten the facts. Of this failure of the Judge, appellant complains. We do not see that he has good cause. It was certainly in his power, within a reasonable time, to have obtained his statement of facts, and not permit such a length of time to pass, when the Judge, whose duties require investigation in so many and different affairs, could not be reasonably expected to remember facts that must of necessity have passed from his mind.

In the case of Fisher vs. Ullman, decided by us, we remanded the case because we were satisfied that appellant had sought to obtain his statement of facts within a reasonable time. So reasonable, that we did not consider the Judge should have refused what he might most reasonably have been expected to remember, and as the adverse party seemed indisposed to aid in certifying to the facts, we declined to permit him thus to gain an advantage.

Appellant files in this Court what he claims to be an assignment of errors, apparent on the face of the record, in the following words:

1st. The dissolving and setting aside of the sequestration issued herein.

2d. The decreeing of the mules sequestered by plaintiffs, claiming their vendor's lien and privilege, to be the property of the intervenor.

3d. The giving judgment for plaintiffs against the defendant

for the purchase price of the mules, without recognizing their lien and privilege as the vendor upon the property sequestered.

All of these propositions depend upon evidence, or upon the existence of some fact; this Court has been furnished with no means of ascertaining more than that the case was adjudged by the District Judge, after hearing evidence, pleadings and arguments of counsel. Nothing in the record suggests that the judgment is erroneous.

The document filed, therefore, is not properly an assignment of errors, it is virtually a complaint that the evidence adduced, on the trial below, did not warrant the judgment.

Sec. 3, of Rule 3, of this Court, expresaly declares that want of evidence to support the judgment cannot be assigned as error.

Appeal dismissed.

No. 296.

A. LEHMAN & Co. *v.* JOSEPH DREYFUS. J. G. SPOR, Garnishee.

1. The facts necessary to give to this Court jurisdiction must affirmatively appear.
2. Where garnishment process issues, upon a judgment exceeding $2,000, and no specific value or amount is charged as held by garnishee, and the prayer against said garnishee is that he be condemned to pay the amount of the judgment, or such portion thereof as may equal what shall be shown as the amount of garnishee's indebtedness to the defendant debtor—held, this Court is without jurisdiction.

Appeal from Civil District Court, Division E. Voorhies, J.

E. T. Florance for plaintiffs and appellants.

Jos. Maille for garnishee and appellee.

KELLY, J.—A. Lehman & Co. having, in suit No. 9665 of the docket of the Civil District Court for the Parish of Orleans, recovered judgment against Joseph Dreyfus for the sum of $3620.05, and costs, and having caused to be issued thereunder a writ of *fieri facias* against the judgment debtor, by supplemental petition made John G. Spor a party defendant to said suit as

garnishee. This supplemental petition, drawn according to a common formula, does not allege that Spor had in his possession any specific property, rights or credits of Dreyfus, the judgment debtor. of any alleged certain value; or that Spor was indebted to Dreyfus in any certain amount. It merely alleges that plaintiffs "have good reason to believe that John G. Spor, a third person, is indebted unto said defendant, or has property or effects in his possession or under his control belonging to said defendant;" and prays that said John G. Spor be made garnishee, and ordered to answer under oath the accompanying interrogatories, and "after all due proceedings, *condemned to pay the amount of said fieri facias and costs;*" the amount of the *fieri facias* being stated in the body of said supplemental petition to be $3620.05, with interest and costs.

To all of the interrogatories propounded to him as garnishee, according to the customary formula, Spor answered, without qualification, in the negative; and, thereupon, on motion of counsel for plaintiffs, "and on showing to the Court that the answers of John G. Spor, garnishee, are untrue," it was ordered that John G. Spor show cause, on a day named, "why he should not be condemned to pay plaintiffs the *amount of their judgment*, or up to such portion thereof as said Spor may be shown to be indebted to defendant.

From a judgment discharging this rule, the present appeal was taken by the plaintiffs.

From the statement which has been made of the pleadings in the cause, it is apparent that the sum claimed by the plaintiffs of Spor, made defendant as garnishee, and for which they pray judgment against him, is the amount of their judgment and writ against Dreyfus, to-wit: three thousand six hundred and twenty dollars and five cents, with interest and costs, or so much thereof, up to the whole amount, as they may show, by proof, that they are entitled to recover.

Not only is the jurisdiction of this Court over this appeal not made to appear affirmatively, as it must be made to appear in

all cases, but, on the contrary, it is apparent on the face of the pleadings that the amount claimed by plaintiffs of the defendant Spor, as garnishee, and for which judgment is prayed against him, is for the whole amount of the judgment against the original defendant, and that the amount involved is plainly beyond the appellate jurisdiction of this Court.

The appeal is, therefore, dismissed at appellants' costs.

No. 414.

A. T. MATHER, Agent, Etc. *v.* J. N. SCHROEDEL. MRS. KITTY McEACHREN, Intervenor.

1. Plaintiff claimed ownership, as third person, of property seized within fifteen days after removal, for rent, and defendant filed general denial; upon trial (and after admission that the property in question was at the time of plaintiff's acquisition upon the premises leased) defendant moved to strike out and exclude plaintiff's evidence, upon the ground that, in any event, said property was subject to the lessor's privilege—held, this motion, sustained by the Court, had the effect of narrowing the controversy to the issue alone presented by said motion.
2. Immediately upon removal from the leased premises, the property of a third person ceases to be subject to the lessor's privilege; and this although, when acquired by such third person, it belonged to the lessee, and was consequently subject to the privilege.

Appeal from Civil District Court, Division B. Houston, J.

W. S. Benedict for plaintiff.

S. S. Carlisle and *J. D. Coleman* for defendant.

KELLY, J.—A. T. Mather, as agent of the heirs of M. A. Douglas, and in that capacity lessor to the defendant, J. N. Schroedel, of the premises No. 120 St. Andrew Street, in the City of New Orleans, sued the latter for rent; and, under a writ of provisional seizure, caused the sheriff to seize and take into his possession certain furniture and effects which, at the time of the seizure, were at No. 298 Bienville street, but which, it is claimed on behalf of the plaintiff, were subject to the landlord's lien and privilege for rent of the premises No. 120 St. Andrew, by reason

of their having been upon said premises, and having been removed therefrom within fifteen days prior to the seizure, without the consent of the lessor.

The plaintiff's proceedings were instituted on the 27th of November, 1883, and on the 3d of December following, Mrs. Kitty McEachren filed therein her petition of intervention and third opposition, claiming that the furniture and effects seized by the sheriff on the 27th of November, 1883, at No. 298 Bienville street, were her property and in her actual possession at the time of the seizure; that they were her sole property, by real, *bona fide* title, she having acquired the same, in great part, by purchase from John N. Schroedel at a just price and for valuable consideration, and a smaller portion from other persons, all before the said seizure was made. She prays for judgment releasing the property to her and quieting her in her title and possession of it, etc.

To this petition the plaintiff filed an exception for vagueness and generality, coupled with a prayer for oyer of intervenor's title; and the exception having been sustained, with leave to the intervenor to amend, she thereupon filed an amended and supplemental petition, wherein, for greater certainty, she says, in substance, that she had acquired the articles seized by the sheriff on the 27th of November, 1883, under the writ of provisional seizure, by purchase from John N. Schroedel, on the 23d of November, 1883, as per act of sale executed the same day before Fred. Zengel, Notary Public, a duly certified copy of which is annexed to the amended answer; that all the furniture and effects named in the inventory annexed to her original petition were acquired by said purchase, except some few articles, which are enumerated.

To the original and amended petitions of intervention, the plaintiff filed an answer, pleading the general issue, and averring "that the alleged sale declared upon and gifts stated, are simulated, null and void, and same are liable to plaintiff's privilege herein."

Upon these pleadings, and a general denial filed by the defendant, Schroedel, the case went to trial. After the plaintiff had

produced his evidence and rested, the stenographer's report states the proceedings as follows:

"Mrs. Kitty McEachren, intervenor, sworn and examined in her own behalf. Resides at 298 Bienville street.

(Mr. Carlisle offers in evidence, in connection with the provisional seizure, the inventory made by the sheriff of the property seized, marked C. Mr. Carlisle also offers in evidence the act of sale of movable effects from John N. Schrodel to Mrs. Kitty McEachren, dated 23d of November, 1883.)

[*Note.*—It is admitted that the furniture described in this act was in the house 120 St. Andrew street at the time of the sale.]

Counsel for plaintiff, Mr. Benedict, moves to strike out the intervention and to exclude any evidence thereunder, upon the ground the property was in the leased premises, with the consent of all parties in interest, and was liable to the lien of the landlord, and it does not appear that there was any change of ownership after it had been removed from the leased premises to No. 298 Bienville street, and that the seizure was thereafter made of that furniture within fifteen days after its removal; namely, the day after its removal."

This motion to strike out the intervention must be regarded as tantamount, in intended legal effect to an exception, that the matters averred in the petitions of intervention, coupled with the admission that the furniture in question was in the leased premises when purchased by the intervenor, did not constitute a cause of action entitling the intervenor to the relief sought by her intervention. By the motion to strike out the intervention and to exclude all evidence thereunder, the plaintiff is to be held to have elected to rest his defence to the intervention upon the ground that the averments of the petitions, coupled with the admission, showed no cause of action in the intervenor, whose pleadings might have been struck out upon that ground; and by so electing to rest his defence upon that ground, he is by inevitable implication to be held to have abandoned the issues joined with the intervenor upon the pleadings to be stricken out, which issues involved the question of the reality or simula-

tion, *bona fides* or bad faith, of the title averred by the intervenor.

The ruling upon the motion was as follows: "The Court maintains the motion to exclude the testimony of the intervenor, so far as that testimony would seek to show any title in her to part of the movables to the prejudice of the lien of the lessor on the movables for his rent; and this ruling is made on the ground, that if the intervenor purchased, as is admitted, movables on leased premises, that those movables are liable to the lessor's lien and privilege for the rent, and continue liable to that lien for the rent for fifteen days after they have been removed from the leased premises.

"The Court reserves the right to the intervenor to give evidence now to show her title to the property as against Schroedel, and her title to the balance of the proceeds of the property, if any, after the lien and privilege of the landlord is satisfied.

"Counsel for intervenor offers in evidence, as against Schroedel, the act of sale of the property marked 'D,' to which no objection is made."

There was judgment below for the plaintiff against the defendant, Schroedel, with lien and privilege on the property provisionally seized, and there was judgment further, that Mrs. Kitty McEachren be recognized as owner of the furniture described in the act of sale, made part of her petition, subject, however, to the lessor's lien and privilege on said furniture for the payment of the judgment, the plaintiff to recover costs.

From this judgment the intervenor appealed.

By election of the plaintiff, in moving to strike out the intervenor's pleadings, all issues of fact which had been joined upon said pleadings, were necessarily waived and abandoned, and a defence to the intervention, in the nature of an exception of no cause of action, or demurrer, was substituted in lieu of the grounds of defence before set up.

All other questions being thus eliminated from the cause, it was narrowed down to a controversy upon a question of law, which may be stated thus: Does, or does not, the landlord's lien attaching to movables on leased premises which have been sold

while still in the premises, by the tenant to a third person, in good faith and for value, adhere to such movables for fifteen days after their removal from the leased premises?

Privileges are *strictissimi juris*. They are in all cases the creation of positive and express law, and can never exist or be extended by implication, inference, construction or analogy. The law which grants the lessor a privilege and lien on the property of others than his tenant, when on the leased premises, with the consent of the owner, is entirely clear; but the privilege is given only when "the goods are contained in the house or store." C. C. Art. 2706.

There is no room for doubt that a third person who purchases property upon leased premises from the tenant acquires it subject to the lien of the landlord, and that it remains subject to such lien as long as it is left upon the leased premises. The law gives the lessor a lien upon the movables not only as long as they are on the leased premises, but as to movables *of the lessee*, it is provided that, in the exercise of this right of lien, he may seize the objects which are subject to it, within fifteen days after they are taken away, but it is stated in plain terms, that this may be done if the objects "continue to be the property of the lessee and can be identified." C. C. Art. 2709.

Obviously, it may not be done if, before seizure, the objects had ceased to be the property of the tenant, either before or after their removal from the leased premises.

Merrick, Race & Foster vs. La Hache, 27 La. An. 87; St. Charles Hotel Co. vs. Tarbox, 23 La. An. 715; Tillman vs. Short, 26 La. An. 512; Hughes vs. Caruthers, Hennen op., 26, 530; Burley vs. Quick, 28 La. An. 432.

These decisions all hold, distinctly, that the landlord's lien does not adhere, for any time, to the property of persons, other than the lessee, after removal from the premises, but ceases upon removal.

Desbau vs. Pickett, 16 La. An. 350, which appears to be somewhat relied on by counsel for the appellant, is not at variance with the decisions above cited, but in entire accord with them.

The Court, in that case, very properly held that there was no conflict between the provisions of Art. 2679 of the Civil Code and those of Art. 288 of the Code of Practice; that they were to be construed together as laws in *pari materia*, so as to allow all the provisions of both Articles operation and effect.

"The only question, therefore, for determination," said the Court, "is, whether the provisions contained in these Articles of the Codes, are inconsistent or irreconcilable with one another. There is no necessary inconsistency or repugnancy between them, for the provisions of Article 288 of the Code of Practice, may be incorporated with Article 2679 of the Civil Code, and be consistent and harmonious with the latter Article; and if incorporated would read as follows:

"In the exercise of the right, the lessor may seize the objects which are subject to it, before the lessee takes them away, or within fifteen days thereafter if they continue to be the property of the lessee and can be identified." "The lessor may seize, even in the hands of a third person, such furniture as was in the house leased, if the same has been removed by the lessee, provided he declare on oath that the same has been removed, without his consent, within fifteen days previous to his suit being brought.

"And if thus incorporated, the general term '*third person*,' would apply to depositaries, bailees, pledgees, and all others *except purchasers* of the effects removed by the lessee, and force and effect would be given to all the provisions of both Articles, which could not be done if they were repugnant to and inconsistent with each other."

We are of opinion that there is error in the judgment of the lower court in holding, upon the case as submitted, that the property, adjudged to be the property of the intervenor, was subject to the landlord's lien and privilege upon it asserted by the plaintiff.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from herein, in so far as it recognizes a lien and privilege in favor of the plaintiff, A. T. Mather, agent of the heirs of M. A. Douglas, upon the property decreed to be the property

of the intervenor, Mrs. Kitty McEachren, and described in the judgment, be reversed and avoided, and that there be judgment here in favor of the intervenor and against the plaintiff rejecting said claim of plaintiff as against the intervenor, with all costs of both Courts; and that in all other respects the judgment of the lower court be affirmed.

No. 336.

ST. CHARLES ST. RAILROAD COMPANY *v.* BOARD OF ASSESSORS.

1. Assessments are presumed correct until the contrary be clearly shown.
2. In assessing stock, in an incorporated company, an assessment fixing as its value, the average of market quotations of such stock, for and during the first three months of the year, is fair and will be upheld.
3. Where a witness has substantially testified to all the facts stated in a certain memorandum in his possession, and, subsequently, the memorandum itself is offered and received over objection—held, the question is not of sufficient practical interest to merit review.

Appeal from Civil District Court, Division B. Houston, J.

Breaux & Hall for plaintiff, appellant.

Wynne Rogers and *L. O'Donnell* for defendant, appellee.

McGLOIN, J.—The plaintiff, an incorporated stock company, complains that for the year 1883, its capital stock was assessed at $745,731, upon a computation of $63 per share; that, in proper time, it made application for a reduction of said assessment to $722,057, or at the rate of $61 per share.

The assessment in question having been made under the provisions of Section 28, of Act 96 of 1882, it is not entirely clear that the Company itself has a cause of action for a reduction of assessment upon its shares of stock. But, be this as it may, we do not consider that, in any case, plaintiff is entitled to judgment.

The evidence establishes the fact that, previous to making the original assessment, the chief clerk of the assessor, under the directions of his principal, took an average of the valuations

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